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In The
Supreme Court of the United States
October Term, 1990

ROBERT L. MATTHEWS AND JAMES HARDISON,
Petitioners,
v.

ALAN DIBONA AND SCOTT GUNDLACH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEAL FOR THE STATE OF
CALIFORNIA, FOURTH APPELLATE DISTRICT,
DIVISION ONE

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QUESTION PRESENTED

The question presented is whether a publicly-funded community college may cancel a play offered for academic credit as part of the college's regular curricular offerings consistent with the teacher's and student's First Amendment rights. This issue raises the precise issue expressly reserved in *Hazelwood School District v. Kuhlmeier*, (1988) 484 U.S. 260 – whether the substantial deference granted to the institutional discretion of public high schools over school-sponsored expressive activities should be denied to public colleges.

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioners Robert L. Matthews and James Hardison respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, entered in the above-entitled proceeding on May 30, 1990.

OPINIONS BELOW

The opinion of the Court of Appeal, Fourth Appellate District, Division One, State of California, is reported at

220 Cal.App.3d 1329; 269 Cal.Rptr. 882, and is reprinted in the appendix hereto, p. 2a, *infra*.

The order of the California Supreme Court denying review of the Court of Appeal's decision has not been reported. It is reprinted in the appendix hereto, p. 1a, *infra*.

The decision of the Superior Court of the State of California (Midlam, J.) has not been reported. It is reprinted in the appendix hereto, pp. 44a-55a, *infra*.

JURISDICTION

Respondents brought this suit on July 11, 1986 in the Superior Court of the State of California, County of San Diego, under 42 United States Code section 1983 and the First and Fourteenth Amendments to the United States Constitution. On January 9, 1989 the Superior Court granted petitioners' motion for summary judgment and entered judgment on their behalf. See pp. 44a-46a, *infra*.

On respondents' appeal, the Court of Appeal on May 30, 1990, reversed the Superior Court's judgment.

The California Supreme Court denied review on July 25, 1990.

The jurisdiction of this Court to review the judgment of the Court of Appeal is invoked under 28 United States Code section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution states in pertinent part as follows: Congress shall make no law . . . abridging the freedom of speech. . . . "

42 United States Code section 1983 states in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law. . . . "

STATEMENT OF THE CASE

This First Amendment litigation focuses on decisions made by college administrators at a publicly-funded community college in San Diego denying a student and teacher permission to perform a play as part of curriculum. The Education Cultural Complex ("ECC"), a branch of the San Diego Community College District, offers college credit courses and adult education courses. The ECC campus consists of several classroom buildings, administrative offices, a library, and the performing arts theater. Petitioner Robert Matthews was the President of the Continuing Education Centers of the San Diego Community College District. Petitioner James Hardison was Dean of Arts and Sciences at ECC.

1. Factual Background

One of the offerings for the 1986 summer session at ECC was Drama 250, scheduled to be taught by respondent Alan DiBona. The curriculum for Drama 250 required that enrolled students produce and perform a dramatic production. (Joint Appendix on Appeal, hereafter "App.," p. 12.) DiBona chose the play "Split Second" for presentation by the Drama 250 class. To ensure sufficient time for preparation, DiBona requested that classes for Drama 250 begin one week earlier than the regularly scheduled classes for the summer session. His request was approved by college officials and auditions for "Split Second" began on June 9, 1986. (App., p. 160, ¶10; pp. 14-15, ¶¶5, 11.)

To be "officially" enrolled in Drama 250, a student was required to fill out an application, fill out an enrollment card for the course, and pay the course fee at the time of enrollment. Respondent Scott Gundlach was never "officially" enrolled in the Drama 250 class at any time. (App., pp. 18-19, ¶¶5, 7; pp. 509-510.)

About one week after commencement of the Drama 250 class, petitioner Matthews received inquiries from sources outside ECC which caused him to inquire into the play chosen for the Drama 250 class. On June 16, he asked DiBona to provide him with the script. (App., pp. 293-296.)

On the afternoon of June 16, Matthews read the first 25 pages of "Split Second" and quickly skimmed through much of the rest of the script. Based upon his reading he determined that the plot was not enhancing, that it was weak, and that the language was inappropriate in that

educational setting. He then advised DiBona that the play would not be produced publicly at ECC. (App., pp. 297-300.) That evening Matthews took the play home with him and read it in its entirety. This reading strengthened his belief that performance of the play would be inappropriate at ECC. (App., pp. 307-308.)

On or about June 17, Matthews requested that Hardison read the play. Hardison took the play home the same day and read it that night. Based on his reading of the play he had some concerns about its appropriateness at ECC. The next day, Matthews and Hardison met, discussed the play, and agreed that it was not an appropriate play for ECC.

Subsequently Hardison met with DiBona to discuss alternatives to producing "Split Second." At this meeting Hardison explained that there were more considerations than merely producing a play at ECC. They included the fact that the Community College District would be sponsoring it, and implications of its exposure to minors in the area while it was rehearsed. (App., p. 383.) On June 18, Hardison met again with DiBona and told him that "Split Second" would not be produced at ECC in any fashion by the Drama 250 class. (App., p. 177, ¶21.)

Sometime prior to the first meeting between Hardison and DiBona, Hardison's secretary provided him a list of 24 classes in which attendance was below ten students. The Drama 250 class was in this group of classes. The list showed only three persons enrolled in the Drama 250 class taught by DiBona. (App., pp. 159, 160, ¶¶9, 10; pp. 170, 384-388.) During any session at ECC, including summer sessions, an average number of 19 students per class

must be maintained so that the college can maintain fiscal responsibility. (App., pp. 407-408.) Hardison recommended to Matthews that all classes on the list be cancelled. Matthews approved cancellation of the classes on the list and subsequently all classes on the list including the Drama 250 class were cancelled. (App., p. 160, ¶11; pp. 313-317, 388.) This occurred on June 17, 1986. (App., pp. 159-160, ¶9.)

Had the Drama 250 class produced a play as part of its course curriculum, advertisements for the play and play bills would have been printed by ECC. These printings also would have informed the public that the production was sponsored by the San Diego Community College District as part of its college curriculum. Tickets for the performance would have been sold to the community at large and to other persons associated with the faculty or student body at ECC. (App., pp. 160-161, ¶¶12-15.)

After cancellation of the Drama 250 class, DiBona and others interested in producing and performing "Split Second" decided to produce and perform it off campus. DiBona and this group rehearsed at Pacific Coast College and performed it at the "Sushi Gallery." (App., pp. 466-468; 524-527.) Opening night for "Split Second" at the Sushi Gallery was on or about Friday, August 1, 1986. After several performances of "Split Second," the play closed in its second week of performances. (App., p. 468; Joint Supplemental Appendix, p. 3.) Plaintiffs were in no way penalized by defendants for the off-campus production.

A class that is not offered on the campus at ECC is not an officially authorized class. In order to be authorized as an off-campus class, such a class must have off-campus field trip approval from the administration at ECC. Otherwise, ECC and the Community College District would not be responsible for the class. (App., p. 413.) Drama 250 possessed no such authorization. An off-campus, non-approved, "unofficial" ECC class is not eligible to receive apportionment income from the State. Students in the class are not eligible to receive grade assignments. (*Id.*) The administration of the Community College District or at ECC is unable to manage assignment of instructors and to ensure course syllabus is being followed in the event that an unofficial, unapproved class is conducted off campus. (App., pp. 413-414.)

2. Proceedings Below

Respondents commenced this action on July 11, 1986 when they filed a complaint for preliminary and permanent injunctive and declaratory relief. In their complaint they sought a judicial declaration that their civil rights were violated by petitioners' refusal to permit the drama class to perform "Split Second" and by cancellation of the class. They sought injunctive relief to prevent cancellation of Drama 250, to prevent the alleged "blocking" of production of "Split Second," and to require bestowal of academic credit upon Gundlach and salary upon DiBona.

On July 15, 1986 they filed a motion for preliminary injunction. On July 30, 1986 the Superior Court denied their motion for preliminary injunctive relief on the basis that Matthews and Hardison properly cancelled DiBona's

summer session Drama 250 class for lack of enrollment; that respondents lacked standing entitling them to the injunctive relief they sought; and that respondents had no right to produce the play "Split Second" at ECC.

On December 6, 1988 the Superior Court heard and granted petitioners' motion for summary judgment on the grounds that the matter was moot, that respondents possessed no standing, and that in any event, their First Amendment rights had not been violated.

On appeal, a majority of the Court of Appeal concluded that petitioners violated the respondents' constitutional rights when they denied permission to produce "Split Second." Preliminarily, the majority found that respondents possessed standing and that the matter is not moot.

The majority, in ruling on the First Amendment issue, relied heavily on the Court's decision in *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503 (1969) finding that:

"The facts of this case present a classic illustration of 'undifferentiated fear' of disturbance on the part of school administrators. DiBona was given the authority to select curriculum materials. The administration became interested in the subject matter of the class only after 'community' opposition was first manifest. When they reacted to this pressure by cancelling the class, there were no facts known to either Matthews or Hardison indicating a 'clear and present danger' of any evil, let alone a 'serious substantive' one. Nor was there any suggestion that the production of the play would 'materially and substantially interfere with the requirements of appropriate discipline in the

operation of the school" . . . ' (*Tinker, supra*, 393 U.S. at p. 509, 89 S.Ct. at p. 738, quoting *Burnside v. Byers*, (5th Cir. 1966) 363 F.2d 744, 749.) Rather, school officials were merely concerned with 'avoid[ing] the discomfort and unpleasantness that always accompany' an unpopular or unorthodox point of view. (*Tinker, supra*, 393 U.S. at p. 509, 89 S.Ct. at p. 738.)" (pp. 20a-21a, *infra*.)

Although the majority alluded to the fact that school administrators possess considerable discretion in deciding on curriculum content it rejected petitioners' argument premised on *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), that petitioners were entitled to deference in determining curriculum. In so doing the majority stated:

"We question whether the rationale underlying the 'school-sponsorship' rule would allow its wholesale extension to educational settings involving adults. The general public is likely to view school-sponsored student speech as bearing the 'imprimatur of the school' (*Hazelwood, supra*, 484 U.S. at 271) largely because of the greater control elementary and secondary schools exercise over the conduct of minor students. Defendants have cited no authority – and we are aware of none – which would allow a college or university to censor instructor-selected curriculum materials because they contain 'indecent' language or deal with 'offensive' topics." (pp. 25a-26a, *infra*.)

In perhaps the most remarkable aspect of the Court of Appeal's opinion it created a "post-commencement limitation" on the power of college administrators to determine curriculum content once a class commences. The majority stated:

"Our conclusions do not leave college administrators powerless to control college curriculum. Although the 'legitimate pedagogical concerns' at the college and university level may be more limited than in elementary and secondary schools, they are not nonexistent. Certainly college officials may limit the drama curriculum to works of an acceptable literary quality and they undoubtedly are entitled to broad deference where such determinations are made in advance rather than, as here, sometime after the class had already begun to meet." (pp. 27a-28a, *infra*.)

The dissent believed that the majority inappropriately invested faculty and students with control of school curriculum under the guise of First Amendment rights. In pertinent part, the dissent stated:

"This case presents the question of who should control the curriculum of an educational institution – the administration, the faculty, or the students. Unfortunately, although it disclaims such result, the majority answers the question by permitting the faculty and students to determine curriculum content. To the extent any administration control will remain, it will have to be pursuant to 'objective standards' which will lead to court supervision. . . . Moreover, the advice it renders is at odds with recent United States Supreme Court authority regarding the power of school administrators to control curriculum content." (p. 29a, *infra*.)

The dissent believed that *Hazelwood*, and not *Tinker*, provided the appropriate decisional grounds:

"The majority's analysis is at distinct odds with the United States Supreme Court holding in *Hazelwood School District v. Kuhlmeier*, (1988) 484 U.S. 260. . . . [I]n my view, *Hazelwood* clearly

authorizes the kind of action taken by school administrators in this case." (pp. 36a-38a, *infra*.)

After reviewing petitioners' conduct the dissent found no policy of censorship, that respondents had not been disciplined, and that respondents' First Amendment rights had not been violated. The dissent further observed that the "post-commencement limitation" on curriculum control is unauthorized by law and an inappropriate judicial intrusion upon the exercise of the college administrators' powers:

"Respectfully, the majority's attempt to distinguish the facts of this case from those which recognize the authority of school administrators over curriculum content is a recognition of the weakness of its position. The majority's creation of a 'post-commencement' limitation on curriculum control is not authorized by law and it is an unwarranted judicial intrusion upon the legitimate authority of a school to deal with the content of its curriculum. I would not impose such a rule." (p. 42a, *infra*.)

The dissent concluded by observing that the majority's opinion transferred decision-making authority in curriculum matters from college administrators to faculty and students:

"I believe the United States Supreme Court has clearly placed significant curriculum and resource decisions in the hands of school administrators. The majority unfortunately has snatched that authority from their hands and given it over to individual faculty (regular or part-time) and students. All of this is done in pursuit of academic freedom." (p. 43a, *infra*.)

REASONS FOR GRANTING THE WRIT

I. The State Court Below Has Decided a Federal Question In a Way That Conflicts with Applicable Decisions of This Court

The Court is respectfully requested to judicially note that this litigation presents the question, expressly reserved in *Hazelwood*, whether college and high school administrators are entitled to the same degree of deference with respect to school-sponsored expressive activities. (See *Hazelwood*, *supra*, 484 U.S. at 273, n.7.) Petitioners believe that although *Hazelwood* dealt with high school curriculum and the instant litigation deals with college curriculum, the cases are conceptually identical. Petitioners seek a ruling from the Court that these college-level educators are entitled to the same degree of deference in curriculum matters as was the high school principal in *Hazelwood*.

The Court below failed to recognize that the question addressed in *Tinker* – whether the First Amendment requires a college to tolerate particular expressive activity – is different from the question presented here – whether the First Amendment requires a college affirmatively to promote expressive activity. (See *Hazelwood*, *supra*, 484 U.S. at 270-271.) The First Amendment does not require a publicly-funded institution of higher learning to promote expressive activity, nor to refrain from exercising control over such activities which require its sponsorship and funding. (See *Muir v. Ala. Educational Tel. Com'n.*, 688 F.2d 1012, 1044 (1982), *cert. den.* 460 U.S. 1023 (1983).

In *Hazelwood*, the question presented was whether the First Amendment required a “school affirmatively to

promote particular student speech." 484 U.S. at 270-271. This question, Justice White said, involved the authority of educators, *inter alia*, "over school-sponsored publications, *theatrical productions*, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." (*Id.* at 271 (emphasis added).)

The decision of the court below applied the *Tinker* standards to the facts presented. The court below observed that there was no suggestion that the production of the play would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." (p. 20a, *infra*, quoting *Tinker*, *supra*, 393 U.S. at 509.) This observation fails to recognize that this Court's standards for resolving disputes arising in educational institutions have evolved since *Tinker*.

Hazelwood, for example, relied on this Court's post-*Tinker* decision in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). *Fraser* held that the First Amendment did not prevent a school system from disciplining a high school student who gave a lewd speech at a school assembly. *Fraser* permitted a school to take action disassociating itself from vulgar and suggestive behavior by a high school student leader at a school event. This Court in *Hazelwood* said *Fraser* did not involve the *Tinker* standard but rested on the school's estimate that the speech was " 'vulgar,' 'lewd,' and 'plainly offensive.' " (*Hazelwood*, *supra*, 484 U.S. at 271-272 n.4.) In retrospect, *Fraser* marked the emergence of a distinction, clearly avowed in *Hazelwood*, between school-sponsored activities and activities which merely occur on campus.

In *Hazelwood*, this Court recognized the authority of school officials to prevent the promotion or dissemination of school-sponsored activities which did not meet the school's standards:

"A school must be able to set high standards for the student speech that is disseminated under its auspices – standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world – and may refuse to disseminate student speech that does not meet those standards." (*Hazelwood, supra*, 484 U.S. at 271-272.)

In short, the question is not whether the cancellation of the Drama course in this case met the *Tinker* standard. *Tinker* does not govern every educational decision which is challenged on First Amendment grounds. The point is that the decision of the college administrators here met the *Hazelwood* test.

On analyzing the facts before the trial court when it granted the petitioners' motion for summary judgment, the court below declared that there were three reasons for the cancellation of the class and play: (1) opposition to the play, "Split Second," from the San Diego religious community; (2) concern about the subject matter of the play in light of community tensions raised by the Sagon Penn trial; and (3) concern that the language of the play was "inappropriate." (p. 17a, *infra*.) The court below acknowledged, however, that the college administrators at ECC justified the cancellation "on the independent ground that the language used in 'Split Second' was 'inappropriate' for a school play." (p. 22a, *infra*.)

The independent ground of which the court below spoke is, of course, the distinction *Hazelwood* makes between school-sponsored or curricular expression and non-school-sponsored or non-curricular expression. School-sponsored or curricular expression is under *Hazelwood* accorded less First Amendment protection than would be the case with non-curricular or *Tinker*-type expression. The court below, nonetheless, held that this distinction cannot justify the decision of the college administrators at ECC to cancel the play.

The court below concluded that the curricular freedom emphasis of *Hazelwood* is entirely bound up with the fact that the case dealt with public high school students. Accordingly, the court below declared that *Hazelwood* cannot and should not be extended to adults or college students. (p. 23a, *infra*.) The court below denied that the "school-sponsorship" rule of *Hazelwood* permits its "wholesale extension to educational settings involving adults." (p. 25a, *infra*.) The deference *Hazelwood* extends to public high school administrators with respect to school-sponsored expression is explained away as "the greater control elementary and secondary schools exercise over the conduct of *minor* students." (pp. 25a-26a, *infra*.)

In short, the court below read *Hazelwood* as if its entire rationale is based on the lesser maturity of high school students as compared with "adults." But a reading of *Hazelwood* quickly discloses it will not bear such a narrow construction. The lesser maturity of high school students is obviously a factor in *Hazelwood* but is not the *only* factor.

This Court, per Justice White, justified according great latitude to school authorities over curricular or school-sponsored expression for three reasons. Such latitude would assure: (1) that students participating in a particular school-sponsored activity would carry away from it "whatever lessons the activity is designed to teach"; (2) that students would not be exposed to material that did not match their level of maturity; and (3) that the speech was not erroneously identified with the school. (*Hazelwood*, *supra*, 484 U.S. at 271.)

It is clear that the level of maturity is only one of the reasons that school authorities were given a greater measure of authority over the curricular speech in *Hazelwood* than was the case with non-curricular speech. Curricular concerns and avoidance of school identification with a particular viewpoint were equally weighty concerns. This is evident not only from Justice White's opinion for the Court but from Justice Brennan's dissent in *Hazelwood* as well:

"The Court offers no more than an obscure tangle of three excuses to afford educators 'greater control' over school-sponsored speech than the *Tinker* test would permit: [1] the public educator's prerogative to control curriculum; [2] the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; [3] and the school's need to dissociate itself from student expression." (*Hazelwood*, *supra*, 484 U.S. at 282-283.)

There is no suggestion in *Hazelwood* that each of these three factors was not entitled to equivalent weights. It is clear that in this case the curricular concerns and the need to disassociate the college from the expression in

controversy were the motivating factors in the decision of the college administrators to cancel the course. Therefore, it is simply error for the court below to focus on only one of the factors – the lesser maturity of high school students – as if it were the exclusive justification for the *Hazelwood* doctrine of deference to institutional discretion in curricular or school-sponsored matters.

Further demonstration that the interpretation of *Hazelwood* in the decision below is erroneous is found in Justice White's statement of the issue for this Court. Under what circumstances, the Court asked, may a school refuse to "lend its name and resources to the dissemination of student expression"? (*Hazelwood, supra*, 484 U.S. at 272-273.) In answering this question, the Court stressed an educational institution's right to act with respect to its curriculum to achieve legitimate pedagogical concerns. If any of the factors which support the *Hazelwood* holding was uppermost in the Court's thinking it appears to be the institution's right to control its curriculum:

"[W]e hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." (*Id.* at 273.)

On the basis of a thorough misconstruction of *Hazelwood*, the court below failed to accord the proper degree of deference to the discretion of college administrators. After petitioner Matthews first examined the script of "Split Second," he concluded that the plot was weak and unsuitable for production at ECC. He immediately advised DiBona that the play would not be produced

publicly. Yet the majority failed to credit Matthews with this evaluation as his reason for denying permission to perform the play. Instead, in footnote 11 of its opinion, it called for the establishment of "objective criteria" which Matthews and Hardison must use "in assessing the play's literary value." (pp. 17a-18a, *infra*.)

There is no legal requirement that a public college establish such "objective criteria" for use under these circumstances. Moreover, the court below's notion that Matthews and Hardison should have had "objective criteria" upon which to base the play's literary value in deciding to deny permission for its performance was specifically rejected in *Hazelwood*. There the Court stated:

"We reject respondents' suggestion that school officials be permitted to exercise pre-publication control over school-sponsored publications only pursuant to specific written regulations. To require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate." (*Hazelwood*, *supra*, 484 U.S. 273, n.6.)

The approach of the court below invites the courts routinely to supervise the curriculum decisions of college and university educators in three ways. First, educators will be required to engage in the nearly-impossible task of adopting such criteria. Second, courts will then review the legal sufficiency of these criteria. Finally, courts will supervise the decision-making process by ensuring curriculum decisions are made in strict compliance with the "objective criteria." Courts are particularly unsuited to review these kinds of decisions. A play appropriate for production at a large university in Pittsburgh, Pennsylvania may be inappropriate at a small community college

in Waco, Texas. It is unlikely that judicial intervention into such matters can successfully deal with subtle and necessary curricular distinctions from one institution of higher learning to another. Court supervision of such decisions can only diminish the rich diversity that abounds in the Nation's institutions of higher learning. Such curriculum decisions are best left to college educators without court supervision. "By and large, public education in our Nation is committed to the control of state and local authorities." (*Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).) "It is only when the decision to censor a school-sponsored . . . theatrical production . . . has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d],' . . . as to require judicial intervention to protect . . . constitutional rights." (*Hazelwood*, *supra*, 484 U.S. at 273.)

Where, as here, a dramatic production would undeniably bear a college's imprimatur and be completely dependent on its financial support through direct funding and use of the institution's faculty, equipment and facilities, the college must be able to disassociate itself from curricular productions that educators reasonably believe will be detrimental to the institution's well-being or to its mission to serve the needs of all of its students. Thus, the decision made by Matthews and Hardison stands on precisely the same footing as the one made by the principal in *Hazelwood* and ought to be sustained for the same reasons.

Finally, as explained more fully within, petitioners believe that a "chilling effect" would result if the court below's "post-commencement limitation" is permitted to endure. (*See infra* p. 26.) The court below has fabricated

this limitation from whole cloth. Nothing in *Tinker*, upon which it relied so heavily, nor in any other legal authority of which petitioners are aware, permits a court to intercede so intrusively into curricular decisions of a public school. Moreover, *Hazelwood* implicitly rejected creation of such a limitation. Clearly, the expressive activities of students in that case had proceeded much closer to completion than had production of "Split-Second" here. Yet the Court was not at all concerned with any "post-commencement limitation" on curriculum control. Indeed, if, as here, college administrators undeniably may cancel a class prior to the start of a semester for reasons supporting the school's academic mission (cf. *Hazelwood*, *supra*, 484 U.S. at 276, n.9, recognizing a school's right to abolish school newspaper) there is no constitutional reason why they may not be so once the semester commences.

II. The State Court Below Has Decided An Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Since the question of whether *Hazelwood* applied to public colleges was not before this Court when it decided that case, the Court properly deferred it. However, in the period since *Hazelwood* was decided confusion has arisen in the lower courts and in colleges and universities concerning this issue and there is now a need for resolution of this issue. Thus, at least one United States Court of Appeals has clearly misapprehended the meaning of the above-quoted statement concerning whether *Hazelwood* applies to public colleges. In *Student Government v. Bd. of Tr. of Univ. of Mass.*, 868 F.2d 473 (1st Cir. 1989), upholding

the right of a state university to terminate its legal services office, the First Circuit, per Judge Toruella, interpreted *Hazelwood* as follows:

"Hazelwood School Dist. v. Kuhlmeier, . . . in which the Court held that a high school newspaper whose production was part of educational curriculum was not a public forum, is not applicable to college newspapers. See Id. 108 S.Ct. at 571 n.7."

This Court, of course, did not rule on *college* newspapers at all in *Hazelwood*. It merely said that the Court did not have to decide that issue.

Even though this Court expressly declined to rule on whether *Hazelwood* applied to public colleges, the court below in effect interpreted that decision as *not* applying to public colleges. Thus, the court below stated: "Defendants have cited no authority – and we are aware of none – which would allow a college or university to censor instructor-selected materials because they contain 'indecent' language or deal with 'offensive' topics." (p. 26a, *infra*.) Yet on the very page upon which this statement is made the court below cited a case which established this precise proposition. *Piarowski v. Illinois Community College*, 759 F.2d 625 (7th Cir. 1985), *cert. den.* 474 U.S. 1007, upheld the decision of college officials who relocated a college teacher's sexually explicit and racially offensive paintings to a less prominent place on campus. The court below lamely tried to distinguish *Piarowski* by emphasizing that the expressive activity in question there was shown on campus and here it was not. (p. 26a, n.14, *infra*.) However, the court below failed to acknowledge when it made this critical fact that the play, "Split Second," was shown in San Diego. (p. 8a, *infra*.)

The facts of *Piarowski* are similar to this case. (*Id.* at 884-887.) Judge Posner described the situation at Prairie State College in *Piarowski*:

"The college authorities were worried that Piarowski's stained-glass windows, [involving, *inter alia*, a brown woman embracing a white male's "grotesquely outsized phallus"], created by the chairman of the college's art department and exhibited in an alcove off the college's main thoroughfare, would convey an image of the college that would make it harder to recruit students, especially black and female students." (759 F.2d at 629-630.)

Judge Posner said in *Piarowski* that the first-floor gallery in Prairie State College's main building was a prominent and visible place. Placement of paintings there implied "college approval rather than just custody." *Id.* at 730.

Piarowski defers to college administrators because of the college's concern that the public would identify the art exhibit with the college to the detriment of the college. The Seventh Circuit decision in *Piarowski* was decided before *Hazelwood*. Unlike this case, *Piarowski* did not involve a specific course in the college curriculum. A post-*Hazelwood* analysis might conclude that the *Piarowski* decision is incorrect since it does not involve curricular activity and that the decision of the court below is also incorrect since it *does* involve curricular activity. The fundamental point is that the uncertainty about whether *Hazelwood* applies to public colleges makes it impossible for administrators of state colleges and universities around the country to know how to handle issues arising from expressive activities like plays and art exhibits. At present, administrators at public colleges and universities

simply do not know how much authority they have concerning expressive activities.

The decision of the court below runs counter to the sensitivity expressed for institutional academic freedom reflected in *Hazelwood*. An academic commentator on *Hazelwood* has observed that the root issue in this case was "how to organize and operate schools in order to maximize the overall contribution to the value and purposes of the First Amendment." (See Hafen, "*Hazelwood School District and The Role of First Amendment Institutions*," 1988 Duke L.J. 685 at 698.) In Dean Hafen's view, the issue over the newspaper articles in *Hazelwood* was properly treated as "a matter of educational policy not constitutional law." "[P]resumptive responsibility" in such matters should be accorded to the educational institutions and not to the courts. (*Id.*) In Dean Hafen's view, one of the "major contributions" of *Hazelwood* was that it constituted a reaffirmation of institutional academic freedom. (*Id.* at 701-705.) These observations about the necessity of protecting the institutional academic freedom of public high schools are equally applicable to public colleges.

The opinion of the court below strikes a critical blow to the ability of administrators and faculties at public colleges to set and control curriculum at such institutions. These educators are expected to create, disseminate and execute curriculum to further the college's academic mission. At the same time they are expected to judiciously expend limited public funding to accomplish that goal. The power bestowed by the court below upon individual faculty and students confers upon persons not charged by the institution or the faculty as a whole with achieving a

college's academic goals *carte blanche* to determine what will be taught, without regard to the impact on the college.

Is the curricular versus non-curricular distinction of *Hazelwood* applicable to public colleges as well? It should be borne in mind that this is a distinction which is now being interpreted by public high schools in a manner which emphasizes the latitude which public high school administrators enjoy in curricular matters to which First Amendment challenges are presented. *Kirkland v. Northside Independent School Dist.*, 890 F.2d 794 (5th Cir. 1989) is illustrative. *Kirkland* involved a reversal of a judgment in favor of a nontenured probationary teacher who brought an action under 42 United States Code section 1983. The teacher asserted, *inter alia*, that his use of a non-approved supplemental reading list in world history was used as a basis for his dismissal in violation of the First Amendment. Relying on precedents such as *Hazelwood*, the Fifth Circuit rejected the idea that the college teacher's curricular decisions were protected by the First Amendment:

"[I]f the efforts of the [school district] to restrict teachers' control over the public school curricula were deemed to constitute 'censorship,' so presumably would *Kirkland's* attempts to override [the] preferences of the trustees, administrators, and parents. . . . We hold only that public school teachers are not free, under the first amendment to arrogate control of curricula. *Id.* at 801-802."

In a pre-*Hazelwood* case involving college teachers at a state supported university, *Lovelace v. Southeastern Mass. University*, 793 F.2d 419, 426 (1st Cir. 1986), the First

Circuit made some observations quite similar to the post-*Hazelwood* comments of the Fifth Circuit in *Kirkland*:

"[M]atters such as course content, homework load, and grading policy are core university concerns, integral to implementation of this policy decision. . . . To accept plaintiff's contention that an untenured teacher's grading policy is constitutionally protected and insulates him from discharge when his standards conflict with those of the university would be to constrict the university in defining and performing its educational mission. The first amendment does not require that each nontenured professor be made a sovereign unto himself."

In *Lovelace*, the First Circuit rejected the idea that the grading policy decision of a non-tenured teacher at a public college was constitutionally protected. In the instant case, the court below declared that the curricular determinations of an adjunct summer faculty member at a public college *are* entitled to such protection.

Furthermore, the decision below accords special First Amendment significance to curricular changes or cancellations by public college authorities. But the court below accorded *no* latitude to college authorities to change or cancel a curricular decision once made:

"Certainly college officials may limit the drama curriculum to works of an acceptable literary quality and they undoubtedly are entitled to broad deference where such determinations are made in advance rather than, as here, sometime after the class has begun to meet." (pp. 27a-28a, *infra*.)

In his pre-*Hazelwood* decision for the Seventh Circuit in *Piarowski*, Judge Posner dealt with the argument "that

the college could have prevented Piarowski from exhibiting the three stained-glass windows in the gallery in the first place but could not order them removed." As to this argument, Judge Posner observed "we cannot imagine what policy of the First Amendment would be served by making sequence determine outcome." *Piarowski v. Illinois Community College, supra*, at 631.

Ironically, the creation by the court below of the "post-commencement limitation" in practical effect can result only in a "chilling effect" upon selection of expressive works for literature, drama, and other such classes that rely on expressive materials for course content. If college administrators know that once a class commences they are powerless to exercise control over curriculum, they are bound to ensure selection of only the most bland course materials prior to commencement of class.

The Seventh Circuit in *Piarowski* is not alone in refusing to attribute First Amendment significance to a decision to cancel. The Fifth Circuit has also rejected this argument in a slightly different context. *Muir v. Ala. Educational Tel. Com'n.*, 688 F.2d 1033 (5th Cir. 1982), *cert. den.* 460 U.S. 1023 (1983). In *Muir*, it was contended that a state public broadcasting system had freedom to choose what programs to schedule but did not have freedom to cancel a program because of public reaction. There was no question that the Commission's decision to cancel the scheduled program was because of its political content. (*Id.* at 1044.) Nonetheless, the Fifth Circuit held that "the decision to cancel a scheduled program is no less editorial in nature than an initial decision to schedule the program." (*Id.* at 1045.)

The foregoing discussion has analyzed the decision below in the light of a number of pre- and post- *Hazelwood* decisions in the federal appellate courts. This discussion focuses on the distinction set forth in *Hazelwood* which grants greater deference to school authorities over expressive activities in school-sponsored or curricular matters than in non-school-sponsored or non-curricular matters. The discussion demonstrates that the question whether this distinction applies to public colleges is indeed an important question of federal constitutional law which has not been decided by this Court but should be.

CONCLUSION

For these several reasons this petition for certiorari should be granted. Petitioners have amply demonstrated the existence of a First Amendment question of national importance to college and university administrators, that this question is one expressly reserved by the Court in *Hazelwood*, that the court below misinterpreted and misapplied two of this Court's decisions, that in so doing it engrafted the unwarranted "post-commencement limitation" that will inappropriately hamper the curricular decisions of educators at public institutions of higher learning, and, finally, that the court below has decided an important question of federal constitutional law – the applicability of *Hazelwood* to public colleges and universities – which has not been, but should be, settled by this Court.

Alternatively, should the Court find that the matter presented herein is moot, petitioners request the Court vacate the judgment below and remand the cause for such proceedings as the Court of Appeal may deem appropriate.

Respectfully submitted,

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APPENDIX A
ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
Fourth Appellate District, Division One, No. D009704
S016032

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK
FILED JUL 25 1990

ALAN DIBONA ET AL.,
Appellants

v.

ROBERT L. MATTHEWS ET AL.,
Respondents

Petition for review DENIED.

Arabian, J. is of the opinion the petition should be granted.

PANELLI
Acting Chief Justice

APPENDIX B
CERTIFIED FOR PUBLICATION
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

| | | |
|-----------------------------|---|-------------|
| ALAN DiBONA, et al., |) | |
| Plaintiffs and Appellants, |) | |
| v. |) | D009704 |
| ROBERT L. MATTHEWS, et al., |) | (Super. Ct. |
| Defendants and Respondents. |) | No. 568311) |

APPEAL from a judgment of the Superior Court of San Diego County, Kevin Midlam, Judge. Reversed.

Laura Whitcomb Halgren, Lois M. Kosch, Gray, Cary, Ames & Frye and Betty Wheeler for Plaintiffs and Appellants.

Lloyd M. Harmon, Jr., County Counsel, Daniel J. Wallace, Chief Deputy County Counsel and Donal M. Hill, Deputy County Counsel for Defendants and Respondents.

Plaintiffs Alan DiBona and J. Scott Gundlach, a college teacher and student respectively, appeal following the entry of summary judgment in favor of defendants Robert Matthews and James Hardison, administrators with the San Diego Community College District. Plaintiffs claim there are issues of fact which remain to be litigated in their claim that defendants violated their constitutional rights by cancelling a drama class because of the subject matter of the play DiBona had selected for the students to perform. We agree and reverse the summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in the light most favorable to the plaintiffs, the record before the court on the motion for summary judgment reveals the following story. The Educational Cultural Complex (ECC) is a branch of the San Diego Community College District located in Southeast San Diego. ECC offers college and adult education courses. Alan DiBona began teaching at ECC on a part-time basis in the fall of 1985. He taught the Drama 250 course during the fall and spring semesters and was asked to again teach the same course for the summer session. The curriculum for Drama 250 requires that the students produce and perform a play.

Although his formal teaching contract for the summer was not signed until April 1986, DiBona began to prepare for the class in March. He selected a play written by Dennis McIntyre entitled "Split Second." The play concerns a Black New York City police officer who, in the course of a routine arrest of a White suspect, is subjected to a flurry of racial slurs and epithets. In a split-second loss of control, the officer shoots and kills the suspect. He then places a knife in the hand of the victim and fabricates a story that the shooting was in self-defense. According to DiBona, "[t]he play centers around the morality of [the officer's] actions, exploring one man's rationalization of why he should not tell the truth and the repercussions of his decision."

ECC does not require that teachers obtain the approval of the college administration for plays to be performed in drama classes. DiBona nonetheless gave a copy of the script to Sylvia M'Lafi Thompson, the ECC

Cultural Affairs Advisor, and discussed the content of the play with defendant Robert Matthews, the ECC President. In late May, DiBona made copies of the play available to students interested in taking the class.

Summer session classes were scheduled to begin at ECC on Monday, June 16. DiBona made special arrangements for the class to begin meeting on Monday, June 9. Over the course of the week auditions were held. By Friday, June 13, DiBona and plaintiff Scott Gundlach – an ECC student and the play's assistant director – had selected and notified the cast. Other students were assigned technical functions such as lighting and costumes.

Approximately 14 students met on Saturday to do an initial read-through of the play. Only two or three were formally enrolled in Drama 250 at that point. The remainder including Gundlach signed "add" cards on Saturday. Defendant James Hardison, the Dean of Arts and Sciences at ECC, conceded it was generally understood that students did not pre-enroll for drama classes because most preferred to wait for the results of the auditions before deciding whether to take the class. DiBona collected the "add" cards and instructed the students to bring any necessary additional fees to class on Monday.¹ He indicated he would submit everything to the registrar's office on Monday evening.

¹ In his deposition, Gundlach explained it was unnecessary for him to pay any additional fees because he was enrolled in other classes and had already paid the maximum fee.

On Monday morning June 16, Matthews received a call from the past president of ECC informing him that certain church leaders in the community were upset about the "Split Second" play and asking him to look into it. Matthews spoke with DiBona at about 2:30 that afternoon. He explained he had received some phone calls which included "negative remarks about the proposed production" and indicated "there might be some unrest" as a result of the play. Matthews told DiBona he "was not prepared or had no desire to take on our religious community, . . ." At Matthews' request, DiBona provided him with a copy of the play. Matthews quickly skimmed the script, focusing on the first two scenes. He concluded the plot "was weak, and that the language was inappropriate in an educational setting." Meeting with DiBona a few minutes later, Matthews expressed his opinion that "this play would not be produced publicly at [ECC]." He refrained from further comment because he wanted to consult with Dean Hardison.

At about 5 p.m. Matthews met with DiBona, Gundlach, and two other students interested in working on the play.² Although he had still not read the bulk of the script, Matthews reiterated his concerns with the "community opposition" to the play. According to DiBona, "He told me . . . that he didn't want organized opposition from the ministers of the community and that he was responsible to the community . . . and that he felt that the language was unacceptable for [ECC]." DiBona and the students attempted to explain that while the language in

² Coincidentally, one of the two students was Matthews' son, Brian.

the first scene was strong, it was appropriate given the theme of the entire play. Matthews agreed to read the complete script that night.

The class met as scheduled Monday evening. DiBona and Gundlach briefed the class on their meeting with Matthews, explaining that for the time being, the play was "on hold." DiBona suggested it was pointless to submit the "add" cards and additional fees to the registrar pending resolution of the controversy. The students discussed potential alternatives open to them and whether the administration reaction had been influenced by the Sagon Penn case currently being tried in San Diego County Superior Court.³

Sometime on Monday or Tuesday, Matthews asked Hardison to read the play. When they discussed the issue again, they agreed the play was inappropriate for presentation at ECC. Hardison termed the characters "a little weak," the plot "anticlimatic," and concluded "it's not very uplifting." He thought "Split Second" "would [not] fit into the category of . . . Tennessee Williams or any of

³ Sagon Penn, a young Black man living in Southeast San Diego, was charged with murder and attempted murder in the shootings of two police officers and a civilian ride-along. Penn was stopped by one of the officers for an alleged traffic violation. He admitted shooting the victims using a gun belonging to the officer who originally stopped him. He claimed, however, that the officer used the traffic stop as a pretext to verbally abuse and physically assault him because he was Black. After a hung jury in his first trial, a second jury acquitted Penn of all major charges. Following the second trial, the remaining charges were dismissed. (See generally, e.g., *Jury Acquits Penn in Slaying of S.D. Officer*, Los Angeles Times (S.D. Cty. ed., July 17, 1987) pt. 1 at p. 1, col. 2.)

the [sic] George Bernard Shaw's works, in my opinion. Just is not of that caliber." Matthews suggested that Hardison talk to DiBona.

DiBona spoke with Hardison on Tuesday evening.⁴ According to DiBona, "Hardison . . . told me the decision to cancel the class was due to the sensitivity of the community to the subject matter. [He] said perhaps the play would do well in La Jolla, but not in Southeast San Diego. Hardison said the community needed to be uplifted, and suggested the class put on 'The Wiz.'"⁵ DiBona declined Hardison's suggestion to use another play, pointing out that he had been preparing "Split Second" for months. He then asked whether it would be possible to conduct the class and perform the play privately so that the students could receive credit. Hardison said he would check with Matthews. The next evening, Hardison told DiBona he and Matthews had decided there would be no class with "Split Second" as the subject matter.

⁴ DiBona also spoke with Matthews by phone on Tuesday. Having now read the entire play, Matthews stated he continued to object to the language of the script. DiBona suggested modifying some of the objectionable language but Matthews remained unpersuaded.

⁵ "The Wiz," an adaptation based on Frank L. Baum's book *The Wonderful Wizard of Oz*, was described by one source as "the most successful all-black musical presented in the 1970's." (Laufe, *Broadway's Greatest Musicals* (1977) p. 425.) Featuring elaborate costumes and a rock music score, the play won the 1975 Tony Award for Best Musical and spawned a 1978 movie version starring Diana Ross. (Lynch, *Musicals! A Directory of Musical Properties Available for Production* (1984) p. 168.)

At about this same time, Hardison received a list of classes at ECC with insufficient enrollment. The Drama 250 class was included on this list because only three students were officially registered. As noted previously, due to the controversy over "Split Second" DiBona had never submitted the "add" cards for 11 of the 14 students to the registrar's office. (See *ante*, p. 5.) Hardison testified it was the "general practice" at ECC to drop classes with less than 10 students. ECC records reflect that Drama 250 was cancelled on Tuesday, June 17. DiBona stated and Hardison confirmed, however, that Hardison never mentioned class enrollment during their discussions. In fact, DiBona never heard the class had been cancelled due to low enrollment until after this litigation began.

After the administration decision was communicated to the students, they decided to rehearse and perform the play off-campus. None of the students including Gundlach received course credit and DiBona was not paid pursuant to his contract for teaching a summer session course.

DiBona and Gundlach filed this action alleging violation of their constitutional rights and seeking declaratory and injunctive relief. At that time, DiBona was no longer a teacher and Gundlach no longer a student at ECC. DiBona, however, was employed as a teacher at the City College campus of the San Diego Community College District. Gundlach was enrolled as a student at the District's Mesa College campus.

Matthews and Hardison moved for summary judgment arguing that the case was moot, that DiBona and

Gundlach lacked standing, and that there was no violation of plaintiffs' constitutional rights. The trial court agreed with defendants, reasoning as follows:

"[A]fter going through it very carefully, I just feel that the defense position, with regard to the fact that there is no justiciable issue, is appropriate under these circumstances, that to . . . render an opinion would be contrary to the law's admonition that we not engage in moot acts or advisory opinions.

"I further agree with the position which is espoused in the moving papers . . . that there is no standing with regard to the remaining parties

. . . .

"And then, finally, I found the argument persuasive that this really didn't involve a violation or an improper . . . impact on the First Amendment rights of the parties who brought the action."⁶

The court later expanded on its view that the plaintiffs' First Amendment rights had not been affected:

" . . . I don't think that there was censorship here. I don't think that there was an improper denial or cancellation of that class. And I do think that what did occur, under these circumstances, most assuredly was reasonable.

"And I think I'm capable of taking a little bit of judicial notice as to what the political atmosphere in Southeast San Diego and in the City of San Diego was at about the time that this arose, with regard to a certain well known and well

⁶ Commenting on the language in the play, the court added: "And I read the play, by the way. And maybe somebody would have been offended, but having sat nine months in a criminal department - that was everyday testimony."

publicized criminal action that was proceeding through our courts.

"And I think that what happened was that the administration weighed the potential of the harm that could have been caused by that play, the fact that obviously, justifiable or not, there were segments of the society that was going to be exposed to it that had evidenced the fact that they were not very happy with it, that the Saigon [sic] Penn situation was a very volatile and potentially violent situation.

"I think all of these things were properly in consideration. I don't view it at all as being a First Amendment matter at all. And, even if it were, I think it's the same situation about the ability to Yell, 'Fire' in a crowd of a theater. I think, under those circumstances, calmness and awareness of the problem justified the action that was taken.

"[Plaintiffs' Counsel]: So it is Your Honor's feeling that the decision - that the administrators had the discretion to act as they did in order to prevent controversy within the campus or the community.

"THE COURT: Within the community. And bearing in mind what they are. And what the nature of the institution was and the fact that they utilized public monies, the geographic location of it. All of those things, I think, were considerations."

Plaintiffs' counsel then argued that the administrators' actions were invalid because they failed to use objective criteria in deciding whether the play was "appropriate." The court responded:

"You see, that's where I part company with your reasoning. I think they did act in an objective,

competent manner. I think to have done otherwise, to say, 'Oh, good heavens. We've got First Amendment rights we have to be aware of' and let them put it on and let the devil take the hindmost would have been unconscionable, under the circumstances.

"I think they did act in a fair and objective way in how they arrived at their determination. Under the circumstances and facts that existed at this time, this play was not an appropriate one to be placed in the public purview."

DISCUSSION

County Counsel on behalf of the defendant college administrators seeks to defend the court's grant of summary judgment on the same three theories raised and relied on below. We address these arguments seriatim.

Standing

Defendants argue that the case is not justiciable because neither DiBona nor Gundlach have standing to assert a violation of their free speech rights under the United States and California Constitutions. The contention need not detain us long. As the court explained in *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, "One who invokes the judicial process does not have 'standing' if he . . . does not have a real interest in the ultimate adjudication because the actor has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented." (*Id.* at pp. 22-23.)

In a controversy of this nature, it is difficult to conceive of persons who could more properly present the relevant facts and argue the relevant issues than the teacher who was prevented from teaching the class and a student who was precluded from taking it. Here, DiBona suffered actual injury because defendants' actions allegedly denied him both the monetary benefits of his teaching contract with the Community College District and the ability to select the course of instruction for the class. (See *post*, fn. 7.) Defendants assert Gundlach lacks standing because he was never officially enrolled in the class. The facts are at least susceptible of the interpretation, however, that Gundlach would have been enrolled but for the allegedly unconstitutional acts by the defendants. Under these circumstances, the issue is not one of standing; Gundlach has a sufficiently personal interest at issue to properly present the case. The question is simply whether Gundlach can prove the causal link necessary to establish his entitlement to relief.

Mootness

The second arrow in defendants' justiciability quiver is their argument that the case is moot because the 1986 summer session has long since ended, neither DiBona nor Gundlach continues to be associated with ECC, and the trial court was without power to grant any form of relief even were it determined the defendants acted unconstitutionally. Defendants ignore the fact that Gundlach continues to seek academic credit for having completed the Drama 250 course. DiBona stated that the production of "Split Second" which the students staged off-campus

would have fully satisfied the course requirements had it been performed at ECC. As we have explained, the mere fact that Gundlach was never formally enrolled in the course does not necessarily preclude his obtaining relief. If Gundlach can show he satisfied all the course requirements for Drama 250 except those made impossible by defendants, the court could properly conclude that course credit should be awarded and order appropriate declaratory and injunctive relief.

Even were the award of course credit inappropriate, an exception to the mootness doctrine exists where the issue is "capable of repetition, yet evading review." (*Southern Pacific Terminal Co. v. ICC* (1911) 219 U.S. 498, 515.) Defendants impliedly concede the three-month-long summer session is sufficiently short that absent application of such an exception, defendants' actions would evade considered appellate review. (See *Roe v. Wade* (1973) 410 U.S. 113, 125; *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 563 (plur. opn.).) They contend, however, there is no "reasonable expectation that the same complaining party [will] be subjected to the same action again." (*Weinstein v. Bradford* (1975) 423 U.S. 147, 149.)

The argument misperceives the degree of certainty necessary to invoke the exception. Here, DiBona continues to teach drama and Gundlach continues to be enrolled as a student in the San Diego Community College District. While they are now not teaching or studying at the District's ECC location, we think such a requirement would be unnecessarily restrictive. DiBona may again teach or Gundlach may again take classes at ECC. Moreover, although defendants were administrators at

ECC at the time the lawsuit was filed, they have since been moved to other positions within the District. Because defendants are *District* employees, we assume any relief of a declaratory nature granted to plaintiffs here will inure to the benefit of all the District's teachers and students.⁷ Finally, were it critical to the maintenance of the lawsuit, plaintiffs should be given the opportunity to amend their complaint to add the District as an additional defendant.

Constitutional Issues

Having disposed of the alleged procedural barriers, we now confront the fundamental question whether the

⁷ DiBona has not attempted to join a breach of contract claim with the request for declaratory relief. Relying on *Bachis v. State Farm Mutual Auto. Ins. Co.* (1968) 265 Cal.App.2d 722, defendants contend declaratory relief as to DiBona is improper because he possesses a "fully matured cause of action for money damages . . . and . . . no declaration concerning future rights and duties is necessary, proper or even possible. . . ." (*Id.* at p. 723.) They further assert that amendment of the complaint would be improper because DiBona failed to comply with the one-year claim filing requirement of Government Code section 911.2. (See *Loehr v. Ventura County Community College Dist.* (1983) 147 Cal.App.3d 1071.)

Because there is no breach of contract action before us, we have no occasion or basis to comment on the applicability of the claim requirement or whether it may be excused. Assuming, however, that DiBona is unable or unwilling to pursue his contractual rights, he may still benefit from a declaration of his rights with regard to the selection of material to be performed in drama classes in the San Diego Community College District because he continues to be employed by the District as a drama instructor. Accordingly, the issues are not moot as to DiBona.

evidence before the court on defendants' motion for summary judgment establishes as a matter of law that plaintiffs' constitutional rights were not violated. Defendants first argue the evidence establishes the class was cancelled for reasons unrelated to First Amendment concerns. They assert it is uncontested Hardison authorized and Matthews approved the cancellation on June 17 because of low enrollment.⁸ This argument misconstrues the central issue. The record reflects that beginning on June 16, Matthews and Hardison expressed their opinions that "Split Second" would not be performed at ECC. While it is true only three students were formally enrolled on June 17, it is equally clear that eleven other students wanted to enroll and would have enrolled had defendants not acted to prohibit performance of the play. Under these circumstances, it cannot be said that the cancellation of the class was unrelated to the content of the play and plaintiffs' attempted exercise of their constitutional rights in performing it.

Of course the mere fact that defendants considered the content of the play in deciding to cancel the class does

⁸ While ECC records indicate the class was cancelled on Tuesday the 17th, the dates are not completely certain. It appears that as late as Tuesday evening, DiBona and Hardison were still discussing alternatives to a public performance of "Split Second". It was not until Wednesday that DiBona was notified there would be no drama class with "Split Second" as its subject. (See *ante*, p. 7.) In addition, Matthews acknowledged that classes cancelled due to low enrollment could be reinstated if it became clear that a sufficient number of students wished to add the course.

not in itself establish a violation of plaintiffs' constitutional rights.⁹ Under the guise of free speech, the First Amendment does not transfer control of a public school's curriculum from school administrators to individual teachers and students. Equally important, however, "[n]either teachers [n]or students shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (*Tinker v. Des Moines School Dist.* (1969) 393 U.S. 503, 506.) As with so many First Amendment issues, the question is one of identifying permissible governmental purposes and balancing the competing interests. To paraphrase the Supreme Court in *Tinker*, our problem lies in the area where the exercise of First Amendment rights by students and teachers collides with the discretion of school administrators in deciding what is appropriate instructional material. (*Id.* at p. 507.)

⁹ Although raised as an issue by plaintiffs, we have not found it helpful to characterize this case as one involving an attempt by government to regulate the content of presentations in a public forum. (See generally, e.g., *Perry Education Association v. Perry Local Educators' Association* (1983) 460 U.S. 37, 45-46.) As we read the record, defendants' objection was not to the performance of "Split Second" at the ECC theater but rather to its production as part of the curriculum in an ECC drama class. Likewise, plaintiffs are complaining not because they could not perform the play - clearly they did perform it at an alternate location. They are seeking, in Gundlach's case, credit for having completed the class and in DiBona's case, a basis to claim entitlement to agreed-upon salary for the 1986 summer session.

The facts before the court on the motion for summary judgment¹⁰ suggest three principal reasons for the cancellation of the class articulated by Matthews and Hardison at various points in time: (1) there was opposition to the play from the religious community; (2) the subject matter of the play was sensitive given the community unrest in the wake of the Sagon Penn trial; and (3) the language of the play was "inappropriate."¹¹

¹⁰ The record before us is not the typical record we see following a court's decision to grant summary judgment. In addition to declarations supporting each side's submissions, we have the full text depositions of each of the four principals: DiBona, Gundlach, Matthews and Hardison. It is thus tempting to assume that the record following a full trial would not be dissimilar to that before us now.

With this in mind, it is important to recognize that plaintiffs filed no cross-motion for summary judgment and the question before us is limited to deciding whether there are issues of fact which remain to be litigated. We answer this question in the affirmative. For the guidance of the trial court on remand, we have on occasion commented on the state of the factual record before us assuming that a full trial will not result in substantial changes. These comments should in no way be taken as an expression of opinion on the outcome of the case should the evidence at trial prove to be significantly different.

¹¹ Matthews and Hardison also criticized the play because it was not "uplifting" and because the plot and characters were "weak". (See *ante*, pp. 4, 6.) We do not read the record to suggest that defendants believed the class could be cancelled because the play was insufficiently optimistic. To use Hardison's own frame of reference (*ante*, p. 6), the plays of Tennessee Williams would have difficulty qualifying if "uplifting" were a necessary prerequisite.

(Continued on following page)

Plaintiffs contend the first and second justifications were the "real" reasons for cancellation of the class. The sequence of events would certainly support such a conclusion since Matthews admitted it was a phone call regarding opposition from religious groups which triggered his initial inquiries of DiBona. Moreover, the trial judge specifically accepted the pending Penn criminal case as a valid reason justifying ECC's caution in producing a play raising similar issues.

Both the United States and California Supreme Courts have spoken to the question of whether government may regulate the content of speech because of concern that it may provoke dissension, dispute or disturbance. More than 40 years ago in *Terminiello v. City of Chicago* (1949) 337 U.S. 1, Justice Douglas wrote:

"[A] function of free speech under our system of government is to invite dispute. It may indeed

(Continued from previous page)

As to the strength of the plot and characters, no one would question the authority of teachers and administrators, in selecting plays to be performed or books to be read, to evaluate the literary quality of the work being considered. Here, however, as in virtually all college-level settings, the administration had delegated to the faculty member the authority to evaluate literary quality and select a play. ECC had no policy requiring or even allowing for the submission and review of materials before they were used in class. Moreover, Matthews and Hardison could point to no objective criteria they looked to in assessing the play's literary value. (See *Mt. Healthy City Board of Ed. v. Doyle* (1977) 429 U.S. 274, 284.) Significantly, DiBona was never told the play was unacceptable because it possessed insufficient literary value. This record provides no basis for concluding as a matter of law that the class was cancelled because of the quality of the play.

best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, [citation], is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." (*Id.* at p. 4.)

Twenty years later in *Tinker v. Des Moines School Dist.*, *supra*, 393 U.S. 503, Justice Fortas repeated *Terminiello's* rationale in rejecting a school district's argument that the wearing of black armbands by some students might provoke a disturbance:

"[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, [citation]; and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." (*Id.* at pp. 508-509.)

Because it concerned conduct on a state college campus, the California Supreme Court's opinion in *Braxton v. Municipal Court* (1973) 10 Cal.3d 138 is of particular interest. Writing for the court, Justice Tobriner echoed themes similar to those articulated in *Terminiello* and *Tinker*:

"[N]either the 'content' of speech nor freedom of association can be restricted merely because such expression or association disrupts the tranquility of a campus or offends the tastes of school administrators or the public. Protest may disrupt the placidity of the vacant mind just as a stone dropped in a still pool may disturb the tranquility of the surface waters, but the courts have never held such 'disruption' falls outside the boundaries of the First Amendment." (*Id.* at p. 146.)

The facts of this case present a classic illustration of "undifferentiated fear" of disturbance on the part of school administrators. DiBona was given the authority to select curriculum materials. The administration became interested in the subject matter of the class only after "community" opposition was first manifest. When they reacted to this pressure by cancelling the class, there were no facts known to either Matthews or Hardison indicating a "clear and present danger" of any evil, let alone a "serious substantive" one. Nor was there any suggestion that the production of the play would " 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school', . . . " (*Tinker, supra*, 393 U.S. at p. 509, quoting *Burnside v. Byers* (5th Cir. 1966) 363 F.2d 744, 749.) Rather, school officials were merely concerned with "avoid[ing] the discomfort and unpleasantness that always accompany" an unpopular or

unorthodox point of view. (*Tinker, supra*, 393 U.S. at p. 509.)

Similar issues were similarly resolved in *Brown v. Board of Regents of University of Nebraska* (D.Neb. 1986) 640 F.Supp. 674. There, the University of Nebraska cancelled the scheduled showing of a controversial film, "Hail Mary," after several members of the public and a state senator complained that the film blasphemed certain religious beliefs. The director of the campus art gallery (within which the theatre showing the film was housed) ordered cancellation of the film because it was "offensive to a segment of society and did not merit the efforts it would take to defend it." (*Id.* at p. 677.) The director was also concerned that the negative publicity concerning the film would adversely affect the university's and the gallery's ongoing budgetary battles in the Legislature. (*Ibid.*) In a suit for declaratory relief, the district court relied on *Tinker* in holding that the decision to cancel the film violated the constitutional rights of persons wishing to view it. "It was not the fact of controversy that caused the cancellation of 'Hail Mary'. It was that the prospect of a religious battle in the uneasy political setting of the time . . . threatened the Peace and stability of the Sheldon Gallery. Even if the cause had been only the fact of controversy, however, cancellation would not have been justified, because action taken by an arm of the state merely to avoid controversy from the expression of ideas is an insufficient basis for interfering with the right to receive information." (*Id.* at p. 679.)

Here, Matthews' expressed desire to avoid "taking on" the religious community is clearly an insufficient basis for cancellation of the class. As to the "politically

sensitive" nature of the play's subject matter, not only is it a constitutionally inappropriate reason for censorship, ultimately it may also be counterproductive for the community. A central premise of the constitutional guarantee of free speech is that difficult and sensitive political issues generally benefit from constructive dialogue of the sort which might have been generated by "Split Second."

B

Defendants suggest their decision may be upheld and the summary judgment affirmed based on the independent ground that the language used in "Split Second" was "inappropriate" for a school play. While it is clear the trial court did not rely on this ground (*ante*, fn. 6), our obligation is equally clear to affirm the judgment if there is an adequate independent basis which establishes as a matter of law that defendants must prevail. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)¹²

We have previously alluded to the fact that school administrators possess considerable discretion in deciding on the content of school curriculum. (See, e.g., *Hazelwood School District v. Kuhlmeier* (1988) 484 U.S. 260, 273; *Epperson v. Arkansas* (1968) 393 U.S. 97, 104.) The appropriateness of language used in a play has – at least in certain contexts – traditionally been viewed as the sort of

¹² Although we conclude defendants' proffered justification regarding the play's indecent language is also an insufficient basis to support censorship, we note that it is at least a question of fact as to what was defendants' true motivation in canceling the class. (See *Board of Education v. Pico* (1982) 457 U.S. 853, 883 (conc. opn. of White, J.).)

factor which may legitimately be considered in making curriculum decisions. For varying reasons, however, we conclude it cannot support defendants' decision to cancel the Drama 250 class and prohibit the performance of "Split Second."

Numerous cases have considered the question under what circumstances school officials may regulate the performance of dramatic productions or the availability of written materials on grounds of inappropriate language or content. Nearly all these cases, however, have involved minors rather than adult college students.¹³ For instance, in *Board of Education v. Pico*, *supra*, 457 U.S. 853, the Supreme Court approved reversal of a summary judgment entered in favor of a school board which decided to remove certain books from a junior high and high school library, allegedly because of vulgarity and sexually explicit language. Although the splintered nature of the opinions in the case makes an express holding somewhat difficult to discern, several of the dissenting opinions are explicitly or implicitly premised on the students' status as minors. (*Id.* at p. 893, dis. opn. of Burger, C.J. ("teenage pupils"); p. 897, dis. opn. of Powell, J. ("I certainly would not *require* a school board to . . . teach such values to children"); p. 920, dis. opn. of Rehnquist, J. ("[T]he government as educator is subject to fewer strictures when operating an elementary and secondary school system than when operating an institution of higher learning").)

¹³ In *Hazelwood School District v. Kuhlmeier*, *supra*, 484 U.S. 260, the Court expressly reserved the question of the extent to which the content of college-level expressive activities could be regulated by school officials. (*Id.* at p. 274, fn. 7.)

Similarly in *Bethel School Dist. No. 403 v. Fraser* (1986) 478 U.S. 675, the Court approved the imposition of discipline on a high school student for utilizing an explicit sexual metaphor in a speech to fellow students at a school assembly. More recently in *Hazelwood School District v. Kuhlmeier, supra*, 484 U.S. 260, a high school principal's decision to remove two articles from a student newspaper was upheld based on his conclusion that the privacy interests of students alluded to in an article on teen pregnancy were inadequately protected and because a person criticized in an article on divorce was given no opportunity to respond. (*Id.* at pp. 274-276.) In reaching its conclusion, the Court suggested that teachers and administrators have more discretion in regulating the content of *school-sponsored* expressive activity so long as the regulation is "reasonably related to legitimate pedagogical concerns." (*Id.* at p. 273; see also *Seyfried v. Walton* (3d Cir. 1981) 668 F.2d 214 (approving school superintendent's decision to prohibit performance of high school play because of sexual content); *Bell v. U-32 Bd. of Educ.* (D.Vt. 1986) 630 F.Supp. 939 (upholding school board's decision not to produce high school play dealing with violence, sexual activity, and drug and alcohol abuse).)

Defendants contend as college administrators they should be afforded the same broad discretion in controlling their curriculum as school administrators at the elementary and secondary level. As a general proposition, however, where children are concerned the legitimate role of the government in regulating speech is substantially broader. (See, e.g., *Ginsberg v. New York* (1968) 390 U.S. 629 (government may prohibit the sale to minors of

sexually explicit material which would be constitutionally protected if sold to adults); see also *FCC v. Pacifica Foundation* (1978) 438 U.S. 726.) In contrast, as the Supreme Court explained in *Healy v. James* (1972) 408 U.S. 169, "[T]he precedents of this Court leave no room for the view that . . . First Amendment protections should apply with less force on college campuses than in the community at large." (*Id.* at p. 180.) In *Papish v. University of Missouri Curators* (1973) 410 U.S. 667 the Court considered the question whether a student could be disciplined for distributing a newspaper on campus containing "indecent" language and material. In a per curiam opinion, the Court invalidated the student's expulsion explaining, "We think *Healy* makes it clear that the mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of 'conventions of decency.'" (*Id.* at p. 670.)

Relying principally on *Hazelwood School District v. Kuhlmeier*, *supra*, 484 U.S. 260, defendants suggest that the broad pronouncements of *Healy* and *Papish* have been undercut by more recent decisions recognizing an enhanced governmental interest in regulating school-sponsored expressive activities such as the play in this case. They suggest this more deferential standard is equally applicable in the college and adult education context.

We question whether the rationale underlying the "school sponsorship" rule would allow its wholesale extension to educational settings involving adults. The general public is likely to view school-sponsored student speech as bearing the "imprimatur of the school" (*Hazelwood*, *supra*, 484 U.S. at p. 271) largely because of the

greater control elementary and secondary schools exercise over the conduct of minor students. Defendants have cited no authority – and we are aware of none – which would allow a college or university to censor instructor-selected curriculum materials because they contain “indecent” language or deal with “offensive” topics.

Moreover, there was no danger anyone likely to be offended would be forced to participate in or view the play. DiBona made the script available to students several weeks before the first class so they could decide whether they wished to audition. Assuming the play was performed publicly, no one would have been required to attend.¹⁴

In any event, we may assume school sponsorship is a factor which under some circumstances can be considered at the college level. We nonetheless cannot validate defendants’ decision here to cancel the Drama 250 class. Although *Hazelwood* mentions a school’s production of a play as the type of expressive activity which may be viewed as “sponsored” (*id.* at p. 271), one can produce a

¹⁴ In *Piarowski v. Illinois Community College* (7th Cir. 1985) 759 F.2d 625, the court upheld a college’s decision to remove certain sexually graphic artwork from a display on a central campus mall and place it instead in a less conspicuous location. Interestingly, the court assumed the college could not constitutionally prohibit the display of the art on campus (*id.* at p. 630) but it concluded the college was not obligated to subject unwitting passers-by to expressive displays some might find offensive under circumstances which might imply college approval. (*Ibid.*) Here, of course, defendants rejected a proposal by plaintiffs to offer only a private performance of the play to which the general public would be denied access. (*Ante*, p. 7.)

play without advocating or subscribing to every idea the author of the play intends to communicate. No one could reasonably argue that a school which presented a play by Shakespeare was thereby advocating the social and sexual mores of 17th Century England which are implicit and often explicit in Shakespeare's works. Moreover, defendants' objection here was based on the indecency of the language used in "Split Second", particularly its first scene.¹⁵ But in contrast to a school paper – which if it allowed students to express themselves using profanity would implicitly condone its use – "Split Second" does not advocate the use of vulgar speech. If anything, the play suggests that the use of profanity and racial slurs may cause people to react emotionally rather than rationally. As the trial court in this case recognized, profane speech is unfortunately the accepted vocabulary of some segments of our society. (*Ante*, fn. 6.) "Split Second" simply recognizes this reality and uses it to create the emotional tension necessary to develop the moral and philosophical issues which are central to the play.

Our conclusions do not leave college administrators powerless to control college curriculum. Although the "legitimate pedagogical concerns" at the college and university level may be more limited than in elementary and secondary schools, they are not nonexistent. Certainly college officials may limit the drama curriculum to works of an acceptable literary quality and they undoubtedly

¹⁵ Defendants inform us that "[i]n the first eleven pages of the script . . . , more than 40 vulgar and profane words are used."

are entitled to broad deference where such determinations are made in advance rather than, as here, sometime after the class had already begun to meet.

At least where adults are concerned, however, literary quality cannot be measured simply by counting the number of "indecent" words in a book or play. (See *ante*, fn. 15.) As Justice Harlan recognized in *Cohen v. California* (1971) 403 U.S. 15, taking a page from McLuhan, no bright line can be drawn between the manner of communication and the content of the ideas communicated.

"[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able . . . to discern little social benefit that might result from running the risk of opening the door to such grave results." (*Id.* at p. 26.)

DISPOSITION

Judgment reversed.

CERTIFIED FOR PUBLICATION

/s/ Wiener
WIENER, Acting P.J.

I CONCUR:

/s/ Work
WORK, J.

CERTIFIED FOR PUBLICATION

HUFFMAN, J., dissenting:

This case presents the question of who should control the curriculum of an educational institution – the administration, the faculty, or the students. Unfortunately, although it disclaims such result, the majority answers the question by permitting the faculty and students to determine curriculum content. To the extent any administration control will remain, it will have to be pursuant to “objective standards” which will lead to court supervision. To reach this unhappy result, the majority opinion has struggled to attempt to overcome the lack of standing of appellant Scott Gundlach and the mootness of the declaratory relief claim of appellant Alan DiBona.

I believe the majority opinion, although scholarly and well written, is truly “advisory” because neither injunctive nor declaratory relief is appropriate to these parties whose relationship with the defendants was severed four years ago. Moreover, the advice it renders is at odds with recent United States Supreme Court authority regarding the power of school administrators to control curriculum content.

MOOTNESS

The “collision” of the respective interests of these parties occurred during the summer of 1986, when DiBona was preparing to offer a class entitled “Drama 250” at the Educational Cultural Complex (ECC), a branch of the San Diego Community College District. As we know, Drama 250 was cancelled, having an official enrollment of only three students, and the play was not

produced at the ECC. DiBona, although a teacher in the San Diego Community College system, was not a teacher at the ECC at the time of filing this action and the record does not indicate he is ever likely to return to that facility. DiBona was not punished or disciplined for his participation in the aborted effort to produce the play "Split Second", nor has the ECC declared a policy of "censorship." Therefore, in order to determine whether there is a current controversy between DiBona and the defendants, we must examine the relief sought by the complaint.

The complaint seeks declaratory and injunctive relief. It is not a suit for breach of contract, nor does the record reveal DiBona has ever filed a claim with the college system for wages he would have been entitled to had he taught the class at the college.¹ The purpose of declaratory relief is to resolve uncertainties and controversies which might result in future litigation. It operates prospectively and does not serve merely to redress past wrongs. (*Interstate Marina Development Co. v. County of Los Angeles* (1984) 155 Cal.App.3d 435, 443.) Declaratory relief is, rather, an action to declare rights and not an action to execute them. (*Babb v. Superior Court* (1971) 3 Cal.3d 841,

¹ As pointed out in the majority opinion, the play "Split Second" was produced by Di Bona and members of his class at a different institution during the summer of 1986. (Maj. opn., p. 8.) The class was never authorized by the San Diego Community College, nor were any of the members of the class ever enrolled in or approved for courses outside of the college system. The majority recognizes there is no contract action before the court with regard to Di Bona's lost wages and such claim therefore cannot be the basis for overcoming the defense of "mootness." (Maj. opn., p. 14, fn. 7.)

848; *Bachis v. State Farm Mutual Auto. Ins. Co.* (1968) 265 Cal.App.2d 722, 727.) In short, declaratory relief actions should relate to controversies which are subject to a specific and conclusive remedy and should not be used for the purpose of advisory opinions or scholarly works based upon hypothetical facts. (*Zetterberg v. State Dept. of Public Health* (1974) 43 Cal.App.3d 657, 661.)

The summer of 1986 has come and gone. The play "Split Second", for whatever literary and social value it has, was performed by DiBona, Gundlach and their colleagues in a public setting. Neither DiBona nor Gundlach is involved with the ECC, Mathews or Hardison, *the entity and persons designated as defendants in this action.*² There is, therefore, no controversy now remaining between DiBona and ECC, Hardison or Mathews warranting a "declaration of rights." A ringing defense of First Amendment liberties, no matter how satisfying, should in my humble opinion be reserved for matters of actual controversy. Inevitably, the results of a ruling as offered in this case force changes in respective responsibilities between people in real life and should therefore be declared only in real life controversies. We should

² The majority opinion relies in part on the relationship of Di Bona and Gundlach to the District as teacher and student at branches other than ECC to support its rejection of mootness. However, the District is not a defendant in this action and there is absolutely no evidence in the record to show the actions in issue here represent any policy or practice of the District. Nor is there the slightest hint in this record of any possible reoccurrence of the peculiar events of this case at some other District facility. In fact, the record demonstrates Mesa College furnished equipment for the performance of the play which was held at a private facility.

not ignore general principles which require courts to decide cases and controversies in order to achieve results deemed to be desirable.

As to DiBona's and Gundlach's request for injunctive relief, similar considerations apply because of events which have transpired. Ordinarily, injunctive relief is available to prevent threatened injury and is not a remedy designed to right completed wrongs. (*Gold v. Los Angeles Democratic League* (1975) 49 Cal.App.3d 365, 372.) Unless there is a showing that the challenged action is being continued or repeated, an injunction should be denied. Moreover, absent extraordinary circumstances, injunctive relief should not be granted where the events have rendered such relief unnecessary or ineffectual. (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132-133.) Whether the issue presented by this complaint will ever arise again is highly speculative. Under these circumstances, the court should not intervene to exercise its injunctive powers. At minimum, there should be a showing of reasonable certainty that the acts complained of are either continuing or likely to be repeated before such judicial intervention is warranted. (*Gold v. Los Angeles Democratic League, supra*, 49 Cal.App.3d at p. 372.)

When DiBona and Gundlach unsuccessfully sought injunctive relief in 1986, they petitioned this court for a writ of supersedeas. We denied their request. They then appealed the denial of the preliminary injunction, but abandoned that appeal on August 29, 1986. Now, four years after the events, with the parties having no relationship to each other and with no indication of any practice, policy or procedure at the ECC that could in any way be deemed censorship, the majority sends this case back to

the trial court to declare the rights of those parties and to grant or deny injunctive relief. The time has passed for such relief and the remedies sought should not be stretched in order to provide the vehicle for a judicial restructuring of the division of responsibilities within the school system.³

STANDING

Gundlach contends he has standing to pursue declaratory and injunctive relief because, he claims, he is entitled to college credits for the course in which he was never enrolled and which was never conducted at the college. The majority opinion reaches out to establish standing for Gundlach, stating: "The facts are at least susceptible of the interpretation, however, that Gundlach would have been enrolled but for the allegedly unconstitutional acts by the defendants." (Maj. opn. at p. 12.) The majority further states "the mere fact that Gundlach was never formally enrolled in the course does not necessarily preclude his obtaining relief. If Gundlach can show he satisfied all the course requirements for Drama 250 except those made impossible by defendants, the court could properly conclude that course credit should be

³ The majority opinion, recognizing the weakness of its position in this regard, states appellants should be allowed to amend their complaint if necessary to add the District as a defendant. (Maj. opn., p. 14.) Aside from the fact appellants since 1986 have never made such a request, their record contains not the slightest hint of facts to support such an amendment. Nor was the trial court required to "cure" their complaint for them.

awarded and order appropriate declaratory and injunctive relief." (Maj. opn., p. 13.) Respectfully, such relief seeks neither a declaration of rights nor an injunction, but a retrospective remedy that compels a school to grant credit for a class allegedly completed four years ago. I confess I am astonished at the notion a court could grant credit to a student for a class never conducted, in which he was never enrolled. Surely, an academic institution which is partially funded based on "official" enrollment, and charged with supervising its classes, should not, by judicial fiat, be required to give academic credit for a rump session of an unauthorized class conducted under unknown circumstances. Such judicial power, if it existed, would be truly awesome.

I submit the majority, feeling strongly about the First Amendment issues raised by this appeal, has chosen to ignore legitimate concerns of the absence of standing and justiciable issues in order to make a policy declaration. In my view, policy declarations ordinarily come from the executive and the legislative branches. Under our tripartite system of government, the judicial branch can make policy declarations only when there is an actual case in controversy brought by parties who have standing. I would not reach the First Amendment issues in this case and would affirm the judgment of the trial court on procedural grounds.

CONSTITUTIONAL ISSUES

Recognizing as I do the dissenter's lot of crying out against the inevitable, I turn then to a discussion of the First Amendment issues.

The majority opinion gives a passing nod to the right of school administrators to control curriculum when it says, "Under the guise of free speech, the First Amendment does not transfer control of a public school's curriculum from school administrators to individual teachers and students." (Maj. opn., p. 16.) The opinion then proceeds to redefine that right of control in instances where the legitimate interests of the school administration "collide" with the claimed First Amendment rights of teachers and students. In truth, the majority strikes a serious blow to the ability of school administrators to set and control curriculum content.

The majority opinion relies heavily on the case of *Tinker v. Des Moines School Dist.* (1969) 393 U.S. 503. There the court interpreted the First Amendment rights of students who had sought to wear black arm bands on school grounds in order to protest the war in Vietnam. The majority of the court balanced the rights of the students on these facts against those interests of the school administration and held the rights of the students to be superior. The court found no compelling interest on the part of the school to justify limiting the expressive rights of these students. It seems clear to me *Tinker* dealt with a far different and less compelling set of interests on the part of the school administration than the facts in this case. Nor do I believe the reasoning of the majority in *Tinker*, which has been severely undercut by more recent United States Supreme Court case law, compels the result advocated by the majority here.

The majority's analysis of the actions by the ECC administration in this case includes a characterization of the reasons its officials offered to support their conduct in

cancelling the class: "(1) there was opposition to the play from the religious community; (2) the subject matter of the play was sensitive given the community unrest in the wake of the Sagon Penn trial; and (3) the language of the play was 'inappropriate.' " (Maj. opn., p. 17.) Thus, the majority's focus rests largely on the concerns of ECC administrators for the effects of the play "Split Second" on the community in which the ECC is located and on ECC's relationship with the people it seeks to serve. Those concerns are dismissed, however, with the statement the school administrators had only an " 'undifferentiated fear' of disturbance" because they knew no facts "indicating a 'clear and present danger' of any evil, let alone a 'serious substantive' one." (Maj. opn., p. 20.)

I respectfully disagree with this somewhat cavalier dismissal of what the trial court found and, I believe to be, legitimate concerns of a community college branch. Further, I believe the majority implies that any curriculum content regulation based upon the impact on the school and the community in such a circumstance must rise to the level of "clear and present danger." In other words, according to the majority only concerns amounting to a cry of "Fire" in a crowded theatre permit action by school administrators.

The majority's analysis is at distinct odds with the United States Supreme Court holding in *Hazelwood School District v. Kuhlmeier* (1988) 484 U.S. 260. In *Hazelwood*, a high school had prevented publication of two articles in its newspaper prepared by the school's journalism class. The school's principal objected to the articles dealing with pregnancy and divorce because of their potential impact on the students and, although there had been

some editing of one article unknown to the principal, the students were not permitted to publish them. In ruling in favor of the students, the Court of Appeals for the Eighth Circuit had relied on *Tinker v. Des Moines School Dist.*, *supra*, 393 U.S. 503 to hold the school newspaper was a public forum in addition to being part of the curriculum and thus the evidence was insufficient to support the principal's concerns of disruption.

In a six to three opinion authored by Justice White, the Supreme Court extensively examined the rights of both students and school administrators. The court noted that the school newspaper (like the production of a play here) was supported principally by school funds. Although some small portion of the cost was recouped, the school was ultimately responsible for this paper's publication. The court pointed out that schools do not possess all the attributes of a public forum and, where the activities may be fairly characterized as part of the school curriculum, the administration has a good deal of authority over "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." (*Hazelwood School District v. Kuhlmeier, supra*, 484 U.S. at p. 271.) In a statement particularly significant to this case, the court commented:

"Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual

speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play 'disassociate itself,' [*Bethel School District No. 403 v. Fraser*, 478 U.S., at 685, not only from speech that would 'substantially interfere with [its] work . . . or impinge upon the rights of other students,' *Tinker*, 393 U.S., at 509, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices - standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world - and may refuse to disseminate student speech that does not meet those standards. . . ." (*Hazelwood School District v. Kuhlmeier*, *supra*, 484 U.S. at pp. 271-272, fn. omitted.)

Thus, in my view, *Hazelwood* clearly authorizes the kind of action taken by school administrators in this case.

The majority opinion seeks to distinguish *Hazelwood* principally because it dealt with high school students and, after all, the ECC is a community college branch.⁴ I submit the majority's attempt to distinguish a clear analysis of the relationship between administrators and students is overly facile. A reading of *Hazelwood* shows the court was concerned with returning discretion to school

⁴ Indeed, the Supreme Court reserved the question of the extent of the applicability of its opinion to college settings as one would expect it to do when dealing with a case in controversy arising from a high school.

administrators when dealing with curriculum, particularly where, as here, the school would have to sponsor, promote, advertise, and financially support the "publication."⁵

The Supreme Court made clear in *Hazelwood* that the concern of the "imprimatur of the school" is a legitimate one that needs to be addressed by those persons who must make the daily decisions for the school and who are held accountable for them. To substitute the judgment of an appellate court made after lengthy contemplation and reflection for that of school administrators in a community already wracked by racial tension between the police and the members of that community is, in my opinion, simply inappropriate.⁶ That a judge, years later, may feel these concerns are "no big deal" does not erase the legitimate contemporaneous perceptions of school administrators who, under these facts, cannot be accused of acting

⁵ Interestingly, the majority opinion rejects the sponsorship concerns of ECC administrators when it questions "whether the rationale underlying the 'school sponsorship' rule would allow its wholesale extension to educational settings involving adults. The general public is likely to view school-sponsored student speech as bearing the 'imprimatur of the school' (*Hazelwood, supra*, 484 U.S. at p. 271) largely because of the greater control elementary and secondary schools exercise over the conduct of minor students." (Maj. opn., pp. 26-27.) However strongly the majority may feel on this issue, there is neither factual nor legal support in this record for such speculation.

⁶ As acknowledged by the majority, the murder trial of Sagon Penn had only recently concluded before these events and the administrators of that community-based college were apparently exquisitely aware of the anguish that case and the police relationship to the minority community had produced.

other than in a sincere effort to carry out what they thought to be the best interests of the school.

Before *Hazelwood* was decided, the Court of Appeals for the Third Circuit in *Seyfried v. Walton* (3d Cir. 1981) 668 F.2d 214, 216-217, considered the question of school sponsorship as a factor bearing on the ability to control expressive productions. The issue there was whether the school superintendent could cancel a high school production of the musical "Pippin" based upon inappropriate sexual content. Although the script had been edited to remove a good deal of the explicit sexual language, the school superintendent deemed the play inappropriate for production in a high school setting. The Third Circuit analyzed the First Amendment in light of the special circumstances of the school environment. Based upon its analysis of *Tinker* and *Epperson v. Arkansas* (1968) 393 U.S. 97, the court concluded the implication of school sponsorship from the authorized production of the play could be viewed as an endorsement. The majority in *Seyfried* held the action of the school superintendent was proper, reasoning: "We agree with the district court that those responsible for directing a school's educational program must be allowed to decide how its limited resources can best be used to achieve the goals of educating and socializing its students." (*Seyfried v. Walton, supra*, 668 F.2d at p. 217.) The court concluded there were sufficient burdens on school administrators, and courts should be reluctant to interfere with the operation of our school system. (*Ibid.*)⁷

⁷ To the same effect, in *Epperson v. Arkansas, supra*, 383 U.S. at p. 104, the United States Supreme Court stated: "By and

(Continued on following page)

The concurring opinion in *Seyfried* written by Judge Rosenn skillfully analyzes the balance between the right of students and teachers to free expression and the right of the school administration to control the school curriculum and environment. He noted the school superintendent did not object to the production of "Pippin" because of its ideas, but because of the explicit sexual overtones. In a comment particularly appropriate to the facts of this case, he observed: "School authorities should have more latitude in limiting the performance by their students in a school forum of a play which the authorities find vulgar and inappropriate because of sharp sexual overtones. Their acquiescence in such a performance might be construed as tacit approval of not only the performance but also the play's content." (*Seyfried v. Walton, supra*, 668 F.2d at p. 220, (conc. opn. of Rosenn, J.); see also *Bell v. U-32 Bd. of Educ.* (D.Vt. 1966) 630 F.Supp. 939.)⁸

Having examined the actions of the ECC officials in light of *Hazelwood*, I find they set no censorship policy and did not discipline either teacher or students. It was the teacher who brought the play to the attention of the school officials and, in light of its content, its vulgarity, and its impact on the relationship of a community-based

(Continued from previous page)

large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional issues."

⁸ The majority opinion also distinguishes *Seyfried* and *Bell* as being cases which deal with high schools and thus inapplicable to college settings.

educational facility and the community it serves, the school officials made the decision not to produce it. To the extent their concerns regarding the play formed a part of the basis to cancel a class (along with 23 other classes) which had only three enrolled students, this was, in my view, a valid exercise of the discretion vested in them. There was, therefore, no violation of the First Amendment rights of either DiBona or Gundlach.

Finally, the majority opinion recognizes some authority in college officials to limit drama curriculum in light of school sponsorship and "literary" concerns, and that judgments made by those officials are entitled to broad deference if made in advance of the class rather than "as here, sometime after the class has already begun to meet." (Maj. opn., p. 29.)

The class in this case had not officially commenced, as witness the enrollment of only three students. The issues concerning the play were not known to the administration before the unofficial meetings of the class and the administrators acted immediately upon becoming aware of those issues. Respectfully, the majority's attempt to distinguish the facts of this case from those which recognize the authority of school administrators over curriculum content is a recognition of the weakness of its position. The majority's creation of a "post-commencement" limitation on curriculum control is not authorized by law and it is an unwarranted judicial intrusion upon the legitimate authority of a school to deal with the content of its curriculum. I would not impose such a rule.

CONCLUSION

School administrators in facilities such as the one before us are charged with responsibility to structure and maintain the curriculum and to husband the limited funds provided them to carry out their educational mission. Academic freedom in the form established by the majority opinion would actually give teachers free rein to cover whatever they want, regardless of content or its potential impact on the school.

Requiring a school to pay for, promote, and advertise within the community a particular play which contains considerable vulgarity and is offensive to the community during a highly-charged and sensitive time is far different from prohibiting the several students in *Tinker* from wearing black arm bands. I believe the United States Supreme Court has clearly placed significant curriculum and resource decisions in the hands of school administrators. The majority unfortunately has snatched that authority from their hands and given it over to individual faculty (regular or part-time) and students. All of this is done in pursuit of academic freedom.

Respectfully, the majority opinion will permit in matters of curriculum content the faculty tail to wag the administration dog. In my view, this sets a bad policy which I hope will not long endure.

CERTIFIED FOR PUBLICATION

/s/ Huffman
HUFFMAN, J.

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE COUNTY
OF SAN DIEGO

| | | |
|----------------------|---|---------------------|
| ALAN DIBONA, et al., |) | No. 568311 |
| |) | |
| Plaintiff, |) | JUDGMENT BY COURT |
| |) | UNDER CODE OF CIVIL |
| v. |) | PROCEDURE SECTION |
| |) | 437(c) |
| ROBERT L. MATTHEWS, |) | |
| et al., |) | Filed JAN 9 1989 |
| |) | |
| Defendants. |) | |
| _____ |) | |

This court, having on December 6, 1988, granted the Motion for Summary Judgment by defendants and having ordered entry of summary judgment as requested in said motion,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs Alan DiBona and Scott Gundlach shall take nothing, and defendants Matthews and Hardison shall recover from said plaintiffs costs of suit in the sum of \$514.10.

DATED: JAN 9 1989

KEVIN MIDLAM
JUDGE OF THE
SUPERIOR COURT

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE COUNTY
OF SAN DIEGO

| | | |
|----------------------|---|--------------------|
| ALAN DIBONA, et al., |) | No. 568311 |
| |) | |
| Plaintiff, |) | ORDER FOR ENTRY OF |
| |) | SUMMARY JUDGMENT |
| v. |) | |
| ROBERT L. MATTHEWS, |) | Filed JAN 9 1989 |
| et al., |) | |
| |) | |
| Defendants. |) | |
| |) | |

The motion of defendants Matthews and Hardison for summary judgment came on regularly for hearing before this court on December 6, 1988 at 1:30 p.m. in Department 35, the Honorable Kevin Midlam, Judge presiding, and Lloyd M. Harmon, Jr., County Counsel, by Donal M. Hill, Deputy, appeared as attorneys for defendants and Laura Whitcomb Halgren appeared as attorney for plaintiffs.

After full consideration of the evidence and points and authorities submitted by both parties, and oral arguments of counsel, the court finds that the moving party has shown by admissible evidence and reasonable inferences therefrom not contradicted by other evidence or inferences, and by matters judicially noticed by this court that there is no triable issue of any material fact with respect thereto, and therefore the said moving party is entitled to judgment as a matter of law. The court specifically finds that the issues are moot, that plaintiff Gundlach possesses no standing and that plaintiffs' rights were not violated by defendants.

Furthermore, it appearing that on December 5, 1988, the court ordered approved a request for dismissal of the prayer for permanent injunctive relief but that the parties intended no such dismissal, IT IS ORDERED that the filed, date-stamped order dismissing plaintiffs' prayer for permanent injunctive relief dated December 5, 1988, shall be and hereby is cancelled, rescinding any entered order. The documents so stamped shall remain in the case file.

IT IS ORDERED that the said motion for summary judgment is granted and judgment shall be entered forthwith as requested in said motion in favor of defendants and against plaintiffs.

DATED: JAN 9 1989

KEVIN MIDLAM
JUDGE OF THE
SUPERIOR COURT

ORDER PREPARED BY:

LLOYD M. HARMON, JR., County Counsel
DANIEL J. WALLACE, Chief Deputy

By /s/ Donal M. Hill
DONAL M. HILL, Deputy

Attorneys for Defendants
Robert L. Matthews
and James Hardison

APPROVED AS TO FORM AND CONTENT: _____

GRAY, CARY, AMES & FRYE

By /s/ Laura Whitcomb Halgren
LAURA HALGREN, Esq.
Attorneys for Plaintiff

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA IN AND FOR THE COUNTY
OF SAN DIEGO

DEPARTMENT 35

BEFORE HON. KEVIN MIDLAM, JUDGE

| | | |
|-----------------------------|---|------------|
| ALAN DiBONA, et al., |) | |
| |) | |
| Plaintiffs, |) | No. 568311 |
| |) | |
| vs. |) | |
| |) | |
| ROBERT L. MATTHEWS, et al., |) | |
| |) | |
| Defendants. |) | |
| |) | |

REPORTER'S TRANSCRIPT

December 6, 1988

APPEARANCES:

For the Plaintiff: GRAY, CARY, AMES & FRYE
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Laurel G. Caiazzo, CSR 3592
Official Reporter
San Diego, California

SAN DIEGO, CALIFORNIA, TUESDAY,
DECEMBER 6, 1988, 1:48 P.M.

* * *

(p. 1) THE CLERK: Item 5, DiBona versus Matthews.

MS. HALGREN: Good afternoon, your Honor. Laura Halgren appearing on behalf of the plaintiffs and opposing parties.

MR. HILL: Good afternoon, your Honor, Donal Hill appearing on behalf of defendants and moving party.

THE COURT: Interesting case. Very interesting case. All I can tell you is, after going through it very carefully, I just feel that the defense position, with regard to the fact that there is no justiciable issue, is appropriate under these circumstances, that to, in light of the facts of this case - to render an opinion would be contrary to the law's admonition that we not engage in moot acts or advisory opinions.

I further agree with the position which is espoused in the moving papers, which were, by the way, quite thorough and quite exhaustive on both - I don't know that any stone was left unturned - that there is no standing with regard to the remaining parties for the issues - for the reasons as set forth in the moving papers.

And then, finally, I found the argument persuasive that this really didn't involve a violation or an improper violation or impact on the First Amendment rights of the parties who brought the action.

And for all of those reasons that's how the (p. 2) tentative was arrived at. And I read the play, by the way. And maybe somebody would have been offended, but

having sat nine months in a criminal department – that was everyday testimony.

MS. HALGREN: I would like to address the points, your Honor.

THE COURT: Certainly.

MS. HALGREN: First, on the issue of justiciable issues, it has been brought to my attention by the attorney for defendants that a Request for Dismissal that he submitted to the Court, requesting that the Court take judicial notice of it, was entered by the Court apparently yesterday as a – as a dismissal. And I wanted to explain what had happened in that instance.

Back in August of '87 we had served, by mail, the defense counsel with a Request for Dismissal. It was in connection with a motion for preference, seeking to have the case set quickly on calendar, to have the trial on the declaratory relief issues take place promptly.

The Clerk of the Court rejected the Request for cdismissal, [sic] telling me that it could not on its own enter it because it was going only to this injunctive relief issue, it had to be heard by the Court.

We were then in Department 1. And the Court declined to grant the case preference and would not hear the special declaratory issues. Therefore, no ruling was made on the injunctive relief. Those issues are still in the case. And it's just been going forward on the regular slow (p. 3) track to trial.

THE COURT: How do we correct that, then? Because, obviously, you want to have an accurate record and one

that is not misconstrued. I would assume that it would be appropriate -

Counsel, do you disagree with those representations?

MR. HILL: Not at all, your Honor. I brought this to her attention. I was confused by the presence in my file of this Request for Voluntary Dismissal Without Prejudice. I believed that the matter had been dismissed and acted on that basis when I provided the Court request to take judicial notice of that dismissal.

The Court's entry of that order was obviously erroneous. It was not my intention to ask the Court to dismiss -

THE COURT: Why don't we do this, then. So the record is clear I'm going to direct the minutes reflect that the file stamp on that dismissal, which I believe would have been yesterday, December 5th, be cancelled, that the document will remain as a part of the file, which I think is appropriate, but not as a file part indicating that the dismissal was entered.

Does that meet with your approval?

MS. HALGREN: That would be fine.

THE COURT: Counsel, any objection?

MR. HILL: No objections.

THE COURT: All right.

(p. 4) MS. HALGREN: I would then like to further address the justic- - mootness issue. That's easier to say. In light of the fact that the injunctive relief claims are still

pending does that in any way alter your Honor's ruling on that issue?

THE COURT: No. I think that there was a procedural glitch that occurred early on in this matter and that the only way that you can avoid it, the problem that you're now in with regard to that particular issue, is that there are means available pursuant to the Code with regard to bringing this matter to an expeditious resolution by way of a temporary restraining order, preliminary injunction and then immediate interlocutory writ.

I am in no way saying anything – anyone did anything improper, negligent or otherwise. I just see that those issues – or those things didn't come to fruition for whatever reason. As a result of it, now, with the passage of time, it's just moot.

MS. HALGREN: Well, let me then address that point because what did happen is there was the hearing on the preliminary injunctive relief, which was denied. And an appeal was taken and a writ of supersedeas brought to have the Appellate Court hear this before the summer session was over.

THE COURT: Right.

MS. HALGREN: That was denied. And the session ended. And at that point then there was no reason to proceed with an appeal on the preliminary injunctive relief (p. 5) issue because that would have been too late to solve the problem.

However, it wasn't too – it isn't too late to resolve the issue of class credit, for example. That's a point that, from the briefs, I think has been argued, if the Court found that

the class should not have been cancelled, the play not censored then students, perhaps, would have a right to receive class credit. And -

THE COURT: And I can't do that. I'll tell you I can't do that. I tend to agree with the bases, as I understood them, for the denial of the preliminary injunction.

And I don't think that there was censorship here. I don't think that there was an improper denial or cancellation of that class. And I do think that what did occur, under these circumstances, most assuredly was reasonable.

And I think I'm capable of taking a little bit of judicial notice as to what the political atmosphere in Southeast San Diego and in the City of San Diego was at about the time that this arose, with regard to a certain well known and well publicized criminal action that was proceeding through our courts.

And I think that what happened was that the administration weighed the potential of the harm that could have been caused by that play, the fact that obviously, justifiable or not, there were segments of the society that was going to be exposed to it that had evidenced the fact that they were not very happy with it, that the Saigon [sic] Penn (p. 6) situation was a very volatile and potentially violent situation.

I think all of these things were properly in consideration. I don't view it at all as being a First Amendment matter at all. And, even if it were, I think it's the same situation about the ability to yell, "Fire" in a crowd of a theater. I think, under those circumstances, calmness and

awareness of the problem justified the action that was taken.

MS. HALGREN: So it is your Honor's feeling that the decision – that the administrators had the discretion to act as they did in order to prevent controversy within the campus or the community.

THE COURT: Within the community. And bearing in mind what they are. And what the nature of the institution was and the fact that they utilized public monies, the geographic location of it. All of those things, I think, were considerations.

And I'm – I'm being as candid with you as I can. Like I say, I found this to be fascinating.

For those of you in the audience that can only see this thin file, the stack of submissions was roughly 2 feet high in this matter. It's a very interesting situation.

MS. HALGREN: One point I'd like to raise in that connection is the issue we briefed relating to the need for objective standards. And I think that it's – it is a problem in this case and that the administrators, frankly, admit that they did not follow objective standards or have (p. 7) prearranged criteria on how to evaluate this type of situation.

The type of harm that occurs in that situation is that when community tempers are flaring, people are emotional, religious leaders are complaining – that type of emotional atmosphere sometimes prevents objective, rational, calm judgment.

And because there were no objective standards here to refer to the administrators ended up acting on either

their subjective views or their wish to keep everything calm and pacified.

THE COURT: You see, that's where I part company with your reasoning. I think they did act in an objective, competent manner. I think to have done otherwise, to say, "Oh, good heavens. We've got First Amendment rights we have to be aware of" and let them put it on and let the devil take the hindmost would have been unconscionable, under the circumstances.

I think they did act in a fair and objective way in how they arrived at their determination. Under the circumstances and facts that existed at this time, this play was not an appropriate one to be placed in the public purview.

MS. HALGREN: I think that the issues that your Honor is ruling on have been briefed fully. And I – there's nothing additional I could add that makes me feel – that would make further difference here. So the record has been set. And we will deal with it as we need to.

(p. 8) THE COURT: All right. I appreciate your professionalism and your approach to it. You did a very good job. I wanted to be sure that both of you had a good record.

Counsel, is there anything further?

Because I assume this would go beyond this Court.

Is there anything you would like to raise or –

MR. HILL: Not at this time, your Honor. I appreciate the opportunity.

THE COURT: I would like to see the play sometime, honestly. It looks like it would be a good one.

MS. HALGREN: Thank you.

And we would request a transcript, please.

No. 90-598

NOV 7 1990

JOSEPH F. SPANOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1990

ROBERT L. MATTHEWS AND JAMES HARDISON,
Petitioners,

v.

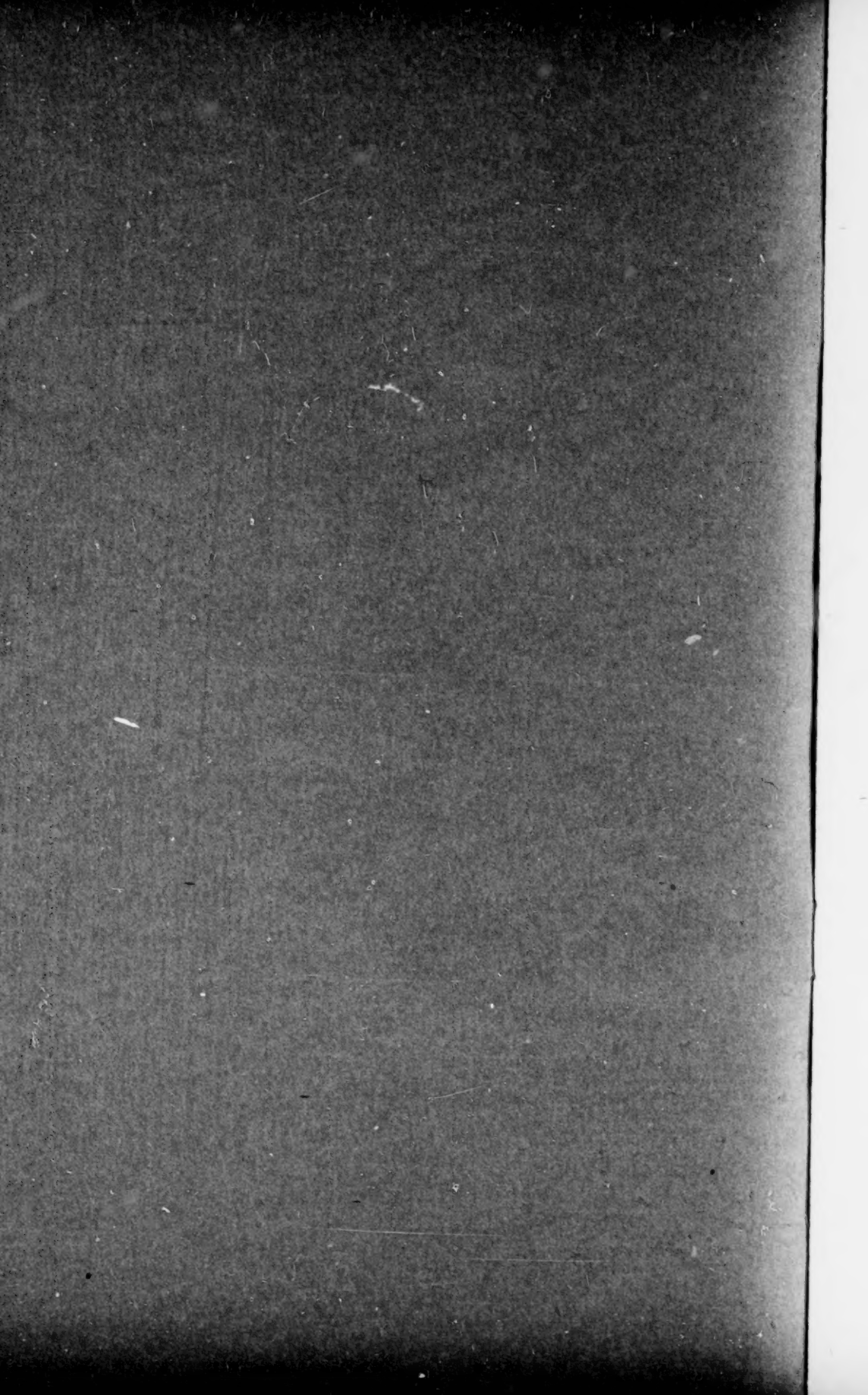
ALAN DiBONA AND SCOTT GUNDLACH,
Respondents.

On Petition For A Writ Of Certiorari To The
Court Of Appeal For The State Of
California, Fourth Appellate District,
Division One

**RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Should the broad free speech rights traditionally afforded adult college students by the First Amendment of the United States Constitution be curtailed by allowing campus administrators to censor the speech of adult students with the same discretion as secondary school administrators have to regulate the speech of minor children?

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No. 90-598

In The
Supreme Court of the United States
October Term, 1990

ROBERT L. MATTHEWS AND JAMES HARDISON,
Petitioners,
v.

ALAN DiBONA AND SCOTT GUNDLACH,
Respondents.

On Petition For A Writ Of Certiorari To The
Court Of Appeal For The State Of
California, Fourth Appellate District,
Division One

RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This petition for Writ of Certiorari follows a state appellate court's reversal of a summary judgment in favor of petitioners. The appellate court found that no clear record had yet been established in this matter and that there were material issues of fact remaining to be litigated. For those reasons, the case was remanded for

trial. The appellate court decision is clearly an interlocutory opinion, not subject to review by this Court.

This case involves the censorship of a play which was scheduled to be produced and performed by a college-level drama class at the Educational Cultural Complex ("ECC"), a branch of the San Diego Community College District.

Respondent Alan DiBona was scheduled to teach the Drama 250 class during the summer 1986 session. Respondent J. Scott Gundlach was a student enrolled in the class.

DiBona selected the play "Split Second" by Dennis McIntyre for the students to produce and perform. Importantly, ECC requires no formal approval or administrative review of plays selected for Drama 250. Further, no guidelines exist by which plays are to be selected or by which the content of a play is to be evaluated. ECC policy places selection of course materials solely within the instructor's discretion.

Shortly after the class began, petitioner Robert L. Matthews, President of ECC, told DiBona he had received some phone calls from local church elders who were upset by the subject matter and language of the play. Matthews, in an effort to avoid organized opposition, refused to allow "Split Second" to be performed.

DiBona raised the issue with petitioner James Hardison, Dean of Arts and Sciences at ECC. Hardison agreed with the decision to censor the play by cancellation of the drama class, noting that the decision was based on the sensitivity of the community to the subject matter.

The appellate court's decision was based, in part, on the unique chronology of facts involved in this case. The court's decision turned on these pivotal facts:

1.) No one in the ECC administration was the least bit interested in "Split Second" until petitioner Matthews received phone calls from community religious leaders complaining about the sensitive *content* and *subject matter* of the play;

2.) the administration interfered only *after* the class began instead of exercising its discretion at a point in time when it was possible to select different course material; and

3.) at the prodding of church leaders, the administration censored the play by cancelling the class, without any consideration of less restrictive alternatives.

Because extensive factual detail is included in the appellate court's opinion, it is not repeated here. (Petition for Writ of Certiorari, pp. 2a-11a).

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

1. **Because No Final Judgment or Decree Has Been Rendered As Required by 28 U.S.C. Section 1257, The Court Does Not Have Jurisdiction to Review this Decision.**

The court's jurisdiction to review decisions of state courts is codified at 28 U.S.C. §1257. Section 1257 requires that there be a final judgment or decree rendered by "the highest court of a State in which a decision can be had."

To be reviewable, the state court judgment "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Commission*, 324 U.S. 548, 551 (1945). More importantly, section 1257 requires that there have been a definitive disposition of all legal and *factual* issues in the case. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948). When further proceedings in state court are contemplated, the case is generally not reviewable. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Further proceedings on remand provide a strong basis for finding a state court judgment nonfinal and thus nonreviewable, especially when cases are remanded for trial. *Laclede Gas Light Co. v. Public Service Comm.*, 304 U.S. 398 (1938). When proceedings on remand, such as a trial, will clarify the record and remove factual ambiguities, there is a compelling reason for concluding that a final judgment has not yet been rendered. *Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981).

The Court has ruled that a state supreme court's order which reversed a trial court's order granting a motion to dismiss is not final. *Louisiana Navigation Co. v. Oyster Com. of Louisiana*, 226 U.S. 99 (1912). This case is in a similar procedural posture.

There is no final judgment to be reviewed. The appellate court merely reversed an order of summary judgment entered in favor of petitioners by the trial court. The

appellate court found there to be triable issues of fact to be litigated, specifically whether petitioners' actions abridged respondents' constitutional rights. (Opinion pp. 17a-18a.) By its decision, the appellate court has remanded this matter *to the trial court for trial* on the merits. In the meantime, the facts of this case are disputed and, as of this juncture, there has been no determination of fact by a trier of fact. Because the facts are contested and because respondents have not yet exercised their right to a trial on the merits, this petition is premature.

The legal issues presented by this case should not be resolved on a factual record in which there are genuine disputes on material factual issues. Petitioners' reasons for cancelling the Drama 250 class and thereby censoring the play must be determined before the Court can decide the constitutional issues such cancellation raises. Because of the procedural posture of this case, there have been no factual findings on this critical issue.

2. The State Appellate Court Decision Is In Accord With the Precedent Established By This Court.

In this case, the state appellate court held that college administrators cannot constitutionally censor a class play because of opposition to the contents of the play voiced by church leaders and the college administration.

In reaching its conclusion, the appellate court properly rejected petitioners' arguments in favor of vesting college administrators with the same broad discretion to regulate speech that is afforded to administrators of grade schools and high schools.

Any analysis of students' First Amendment rights necessarily involves drawing a distinction between government's interest in regulating speech directed to an audience of school children and the regulation of speech directed to an adult college audience or the public at large. Petitioners' arguments in favor of broad administrative discretion fail to acknowledge this distinction.

The Court has recognized the broad free speech rights of students on college campuses. It has recognized that college administrators cannot curtail the dissemination of ideas simply because certain facets of society find them objectionable. *Papish v. University of Missouri Curators*, 410 U.S. 667, 670 (1973). In *Papish*, the Court summarized the applicable law, stating:

[T]he mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of 'conventions of decency.'

Id., 410 U.S. at 670. The Court held that a university violated a student's First Amendment rights when it disciplined her for distributing a campus newsletter containing offensive language and a cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice. The Court held that the university did not legitimately exercise its authority because the discipline was the result of disapproval of the content of the newspaper. *Id.*, 410 U.S. at 670. The Court explained that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech" *Id.* at 671. In addition, as this Court explained in *Healy v. James*, 408 U.S. 169 (1972), "[T]he precedents of this Court leave no room for the view

that . . . First Amendment protections should apply with less force on college campuses than in the community at large." *Id.*, 408 U.S. at 180.¹

The unique facts of this case establish that petitioners censored "Split Second" because it was offensive to the college administration and certain members of the local religious community. This was a clear violation of respondents' constitutional rights as established by the Court in *Papish v. University of Missouri Curators* and *Healy v. James*, *supra*.

As the state appellate court aptly noted, this case presents a "classic illustration" of speech regulated because of the fear that it would cause an unpleasant disturbance. (Opinion, p. 20a) The ECC administrators were concerned only with "avoiding the discomfort and unpleasantness that always accompany" an unpopular or unorthodox point of view. (Opinion, pp. 20-21a, citing, *Tinker v. Des Moines School District*, 393 U.S. 503, 509 (1969).)

3. Because The Decision Of The State Appellate Court Is In Accord With Case Law Involving Collegiate Activities, There Is No Clear Conflict Requiring Supreme Court Resolution.

The Court recognized in *Tinker v. Des Moines School District*, *supra*, that students do not leave their rights to free expression at the schoolhouse gate. *Id.*, 393 U.S. at

¹ The decisions of the California Supreme Court are also in accord. *Braxton v. Municipal Court* (1973) 10 Cal.3d 138 (content of speech presented on a college campus cannot be restricted because it offends the tastes of school administrators or the public.)

506. The rights of adult college students are even greater. *Nicholson v. Board of Educ., etc.*, 682 F.2d 858, 863 (9th Cir. 1982).

As noted earlier, the Court held unconstitutional disciplinary action taken against a student for distributing a campus newspaper, the *contents* of which offended school officials. *Papish v. University of Missouri Curators, supra*, 410 U.S. 667 at 671.

Other courts addressing the right to express controversial or unpopular opinions on college campuses are in accord with Supreme Court precedent finding broad free speech rights in this context. *Nicholson v. Board of Educ.*, 682 F.2d 858, 863 (9th Cir. 1982) ("The activities of high school students may be more stringently reviewed than the conduct of college students."); *Brown v. Board of Regents*, 640 F.Supp. 674 (D.Neb. 1986) (Holding that college administrators could not constitutionally cancel the presentation of a controversial film at a college theater because of opposition to the film from a state senator and members of the public.)

Even case law cited by petitioners is in accord. Petitioners incorrectly cite the case of *Piarowski v. Illinois Community College*, 759 F.2d 625 (7th Cir. 1985) as support for constitutionally allowing a university to censor faculty-selected materials on the grounds of indecency. The *Piarowski* case, of course, *did not* deal at all with curriculum or class materials, but the display of an instructor's art work on a college campus. There is an important distinction between the facts of *Piarowski* and the facts of this case. In *Piarowski*, the college administration *did not* censor the work involved as petitioners imply. The work

was moved to a different location, but the university allowed it to be presented on campus. This was a critical point for the *Piarowski* court which assumed the college could not constitutionally prohibit the display of the art on campus. *Id.* at 630. In this case, in contrast to *Piarowski*, there was no attempt by the college administration to find a less restrictive alternative, although one was suggested. (Opinion, p. 26a, n. 14) Instead, the college completely silenced the drama class. Thus, *Piarowski* provides no support for petitioners' actions.

There is no conflict among lower court decisions to be resolved. The ruling which petitioners seek from the Court is entirely unprecedented in a collegiate setting on these or similar facts. No lower court has extended to college administrators the broad discretion of high school administrators to censor student speech established by *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

The petitioners fail to note another key factor in this case – student participation in Drama 250 is voluntary. The ECC was not forcing unwilling students to rehearse and perform a play offensive to them. Voluntariness is an important factor in determining whether school administrators have a right to proscribe the type of play students perform. (Opinion, p. 26a.) In *Bowman v. Bethel-Tate Bd. of Educ.*, 610 F.Supp. 577, 580 (D.Ohio 1985), vacated without op. 798 F.2d 468 (6th Cir. 1986), the court held the school board could not halt a school play on the basis of curriculum control where participation was voluntary. 610 F.Supp. at 580-581. The court reached its decision

even though the play was "part of the school's offerings of avenues of personal development" and a "necessary adjunct to the curriculum." *Id.* at 580.

The script of "Split Second" was circulated in advance of the start of class so students could decide whether they wished to audition. The class was not a mandatory course and no one was required to attend its production.

Petitioners also misconstrue the appellate decision as creating constitutional protection for DiBona's curriculum selection. (Petition for Writ of Certiorari, p. 25.) This is not the holding of the state appellate court. Petitioners then attempt to bolster their arguments against such a holding by citing and discussing cases dealing with curriculum-based disputes.² Constitutional protection of instructor-selected curriculum was never the issue in this case. The reason it has never been an issue is because the ECC set no curriculum for the Drama 250 class. In this case it is factually undisputed that there was neither a review procedure for course materials nor any requirement that such materials be reviewed or approved by any college official. Unlike the cases cited by petitioners, DiBona did not deviate from curricula or standards set by the educational institution. This is because the ECC never cared to set such standards for this course until after controversy arose. Discretion for selecting the play for Drama 250 was vested completely in DiBona.

² Petitioners rely on *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir. 1989) and *Lovelace v. Southeastern Mass. University*, 793 F.2d 419 (1st Cir. 1986).

As the state appellate court points out, because this is a case involving instructor-selected curriculum materials (Opinion, p. 20a), "The materials cannot then be censored merely because they contain 'indecent' language or deal with 'offensive' topics." (Opinion, p. 26a).

Arguments relating to the permissible scope of review of course materials by a college administration are misdirected in this case because the facts simply do not present that issue. What is at stake in this case is:

[T]he right to receive information and to be exposed to controversial ideas – a fundamental First Amendment right. If . . . [the play] can be banned by those opposed to [the] ideological theme, then a precedent is set for the removal of any such work.

Pratt v. Independent School District No. 831, Forest Lake, 670 F.2d 771, 779 (8th Cir. 1982).

The pivotal fact in this case was petitioner Matthews' clearly expressed desire to "avoid 'taking on' the religious community" as his reason for cancelling the play. Based on the factual chronology of this case, it is quite evident that the play was cancelled because of controversy – because some members of the community found "Split Second" to be in poor taste, objecting to its *subject matter*. This is clearly unconstitutional under any precedent articulated by this Court or the lower federal courts which have addressed this issue.



CONCLUSION

Petitioners are attempting to obtain a ruling which is not only unprecedented but unwarranted in a case where college students and college faculty are exercising their right to free expression. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

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